TEXAS REGISTER

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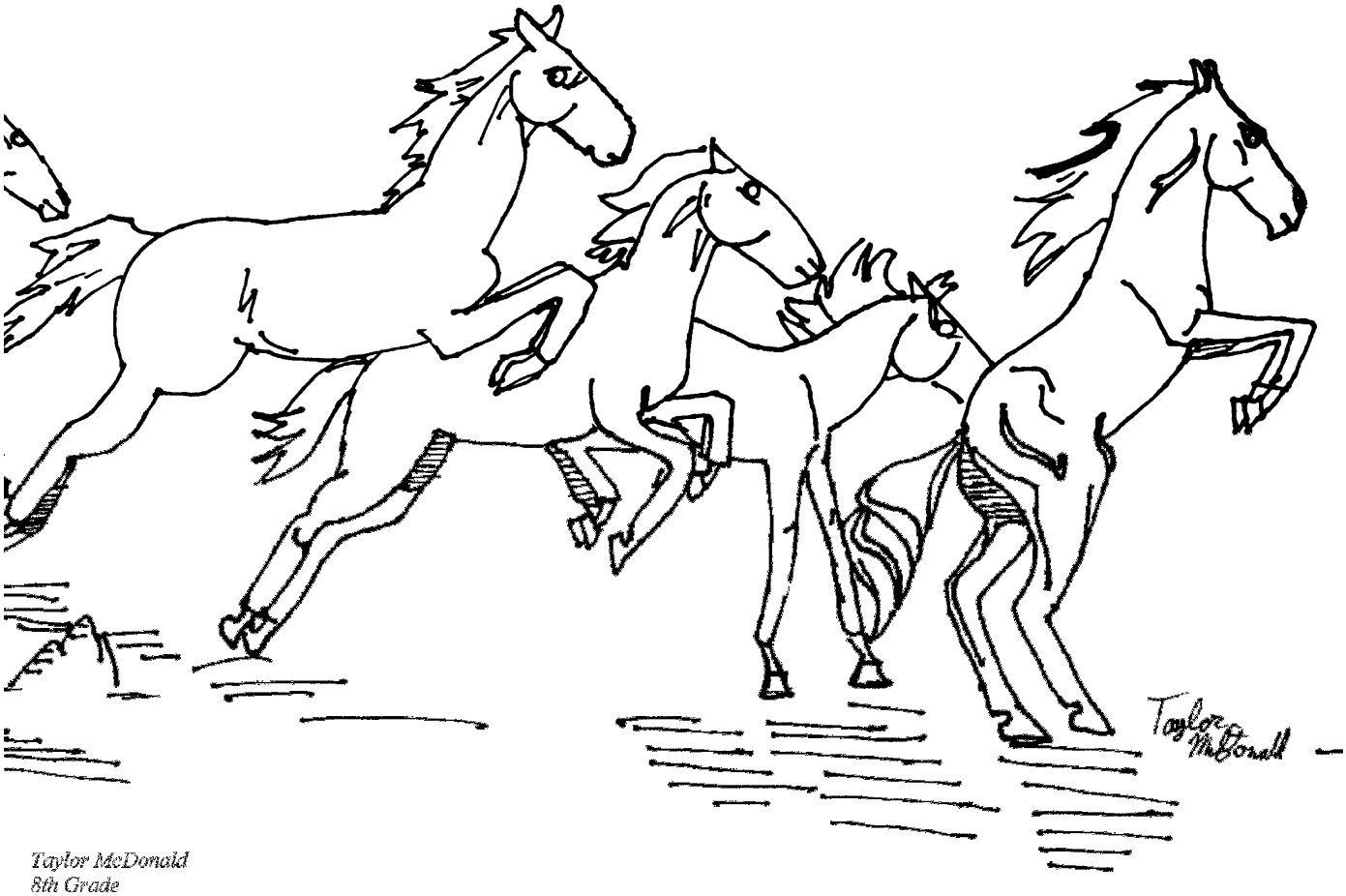

Taylor McDonald
8th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

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RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for December 6, 2007

Appointed to the Texas Board of Professional Land Surveying for a term to expire January 31, 2013, David Gregory Smyth of Devine (Mr. Smyth is being reappointed).

Appointed to the Texas Board of Professional Land Surveying for a term to expire January 31, 2013, Jon Hodde of Brenham (replacing A.W. Osborn of Tyler whose term expired).

Appointed to the Texas Board of Criminal Justice for a term to expire February 1, 2009, Janice Harris Lord of Arlington (replacing Patricia Day of Dallas whose term expired).

Appointed to the Texas Board of Criminal Justice for a term to expire February 1, 2013, John Eric Gambrell of Highland Park (replacing Pierce Miller of San Angelo whose term expired).

Appointed to the Texas Board of Criminal Justice for a term to expire February 1, 2013, R. Terrell McCombs of San Antonio (replacing Adrian Arriaga of McAllen whose term expired).

Appointments for December 7, 2007

Appointed to the Texas Department of Housing and Community Affairs, effective January 1, 2008, for a term to expire January 31, 2011, Juan Sanchez Munoz of Lubbock (replacing Shadrick Bogany of Missouri City whose term expired).

Appointed to the Texas Southern University Board of Regents for a term to expire February 1, 2011, Richard Knight, Jr. of Dallas.

Rick Perry, Governor

TRD-200706347

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Appointments

Appointments for December 13, 2007

Appointed to the Texas Funeral Services Commission for a term to expire February 1, 2011, Joyce Odom of San Antonio (replacing Javier Villalobos of McAllen who resigned).

Appointed to the Texas Funeral Services Commission for a term to expire February 1, 2013, Carol M. Becker of Aledo (replacing Harry Whittington of Austin whose term expired).

Appointed to the OneStar National Service Commission for a term to expire March 15, 2010, Robert Scott of Austin (replacing Shirley Neeley of Austin whose term expired).

Appointed to the Product Development and Small Business Incubator Board for a term to expire February 1, 2013, Michael Davis of Austin (Mr. Davis is being reappointed).

Appointed to the Product Development and Small Business Incubator Board for a term to expire February 1, 2013, David Margrave of San Antonio (Mr. Margrave is being reappointed).

Appointed to the Product Development and Small Business Incubator Board for a term to expire February 1, 2013, Neil Iscoe of Austin (Mr. Iscoe is being reappointed).

Appointed to the Select Committee on Public School Accountability, pursuant to SB 1031, 80th Legislature, Regular Session, for a term to expire January 13, 2009, Larry Kellner of Houston.

Appointed to the Select Committee on Public School Accountability, pursuant to SB 1031, 80th Legislature, Regular Session, for a term to expire January 13, 2009, Sandy Kress of Austin.

Rick Perry, Governor

TRD-200706400

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Appointments

Appointments for December 17, 2007

Designating John Chism as Presiding Officer of the Texas Private Security Board for a term at the pleasure of the Governor. Mr. Chism is replacing George Craig of Corpus Christi as presiding officer.

Appointed to the Texas Private Security Board for a term to expire January 31, 2011, Mark Smith of Dallas (replacing George Craig of Corpus Christi whose term expire).

Appointed to the Texas Private Security Board for a term to expire January 31, 2013, Charles Crenshaw of Austin (replacing Michael Samulin of San Antonio whose term expired).

Appointed to the Texas Private Security Board for a term to expire January 31, 2013, Doris Davis of Arlington (replacing Linda Sadler of Lubbock whose term expired).

Appointed to the Texas Optometry Board for a term to expire January 31, 2011, Larry Fields of Carthage (replacing Ann Bradford of Midland whose term expired).

Appointed to the State Employee Charitable Campaign Policy Committee for a term to expire January 1, 2008, Deryl Creekmur of Austin (Mr. Creekmur is being reappointed).

Appointed to the State Employee Charitable Campaign Policy Committee for a term to expire January 1, 2008, Mildred Gay Dodson of Round Rock (Ms. Dodson is being reappointed).

Appointed to the State Employee Charitable Campaign Policy Committee for a term to expire January 1, 2008, Veronda Durden of Round Rock (Ms. Durden is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2008, Marty Garza of San Antonio (Mr. Garza is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2008, Joe Campos of Dallas (Mr. Campos is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2008, Fred Wilson, Jr. of Lubbock (replacing James Kingham of Nacogdoches whose term expired).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2009, Ravi Shah of The Colony (Mr. Shah is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2009, Michael Mount of McKinney (Mr. Mount is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2009, Mark Delaney of Tomball (Mr. Delaney is being reappointed).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2009, Rolando Rubiano of Harlingen (replacing Davy Beicker of San Antonio whose term expired).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2009, Larry Wilkinson of Friendswood (replacing Doug Robinson of Coppell whose term expired).

Appointed to the Industrialized Building Code Council for a term to expire February 1, 2009, Bobby Bowling of El Paso (replacing Gary Purser of Amarillo whose term expired).

Rick Perry, Governor

TRD-200706476

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Proclamation 41-3139

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, sixteen proposed amendments to the Constitution of Texas were voted on in the Constitutional Amendment Election held on November 6, 2007; and

WHEREAS, on the 4th day of December, 2007, I, Rick Perry, Governor of the State of Texas, did certify the tabulation prepared by the Secretary of State; and

WHEREAS, the tabulation and total of the votes cast for and against each proposed amendment established that the voters of the State of Texas adopted the following sixteen proposed amendments by a majority vote to wit:

PROPOSITION 1 as submitted by House Joint Resolution No. 103 providing for the continuation of the constitutional appropriation for facilities and other capital items at Angelo State University on a change in the governance of the university.

PROPOSITION 2 as submitted by Senate Joint Resolution No. 57 providing for the issuance of $500 million in general obligation bonds to finance educational loans to students and authorizing bond enhancement agreements with respect to general obligation bonds issued for that purpose.

PROPOSITION 3 as submitted by House Joint Resolution No. 40 authorizing the legislature to provide that the maximum appraised value of a residence homestead for ad valorem taxation is limited to the lesser of the most recent market value of the residence homestead as determined by the appraisal entity or 110 percent, or a greater percentage, of the appraised value of the residence homestead for the preceding tax year.

PROPOSITION 4 as submitted by Senate Joint Resolution No. 65 authorizing the issuance of up to $1 billion in bonds payable from the general revenues of the state for maintenance, improvement, repair, and construction projects and for the purchase of needed equipment.

PROPOSITION 5 as submitted by Senate Joint Resolution No. 44 authorizing the legislature to permit the voters of a municipality having a population of less than 10,000 to authorize the governing body of the municipality to enter into an agreement with an owner of real property in or adjacent to an area in the municipality that has been approved for funding under certain programs administered by the Texas Department of Agriculture under which the parties agree that all ad valorem taxes imposed on the owner's property may not be increased for the first five tax years after the tax year in which the agreement is entered into.

PROPOSITION 6 as submitted by House Joint Resolution No. 54 authorizing the legislature to exempt from ad valorem taxation one motor vehicle owned by an individual and used in the course of the owner's occupation or profession and also for personal activities of the owner.

PROPOSITION 7 as submitted by House Joint Resolution No. 30 to allow governmental entities to sell property acquired through eminent domain back to the previous owners at the price the entities paid to acquire the property.

PROPOSITION 8 as submitted by House Joint Resolution No. 72 to clarify certain provisions relating to the making of a home equity loan and use of home equity loan proceeds.

PROPOSITION 9 as submitted by Senate Joint Resolution No. 29 authorizing the legislature to exempt all or part of the residence homesteads of certain totally disabled veterans from ad valorem taxation and authorizing a change in the manner of determining the amount of the existing exemption from ad valorem taxation to which a disabled veteran is entitled.

PROPOSITION 10 as submitted by House Joint Resolution No. 69 to abolish the constitutional authority for the office of inspector of hides and animals.

PROPOSITION 11 as submitted by House Joint Resolution No. 19 to require that a record vote be taken by a house of the legislature on final passage of any bill, other than certain local bills, of a resolution proposing or ratifying a constitutional amendment, or of any other nonceremonial resolution, and to provide for public access on the Internet to those record votes.

PROPOSITION 12 as submitted by Senate Joint Resolution No. 64 providing for the issuance of general obligation bonds by the Texas Transportation Commission in an amount not to exceed $5 billion to provide funding for highway improvement projects.

PROPOSITION 13 as submitted by House Joint Resolution No. 6 authorizing the denial of bail to a person who violates certain court orders or conditions of release in a felony or family violence case.

PROPOSITION 14 as submitted by House Joint Resolution No. 36 permitting a justice or judge who reaches the mandatory retirement age while in office to serve the remainder of the justice's or judge's current term.

PROPOSITION 15 as submitted by House Joint Resolution No. 90 requiring the creation of the Cancer Prevention and Research Institute of Texas and authorizing the issuance of up to $3 billion in bonds payable from the general revenues of the state for research in Texas to find the causes of and cures for cancer.

PROPOSITION 16 as submitted by Senate Joint Resolution No. 20 providing for the issuance of additional general obligation bonds by the Texas Water Development Board in an amount not to exceed $250 million to provide assistance to economically distressed areas.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 4th day of December, 2007.

Rick Perry, Governor

Attested by: Coby Shorter, III, Deputy Secretary of State

TRD-200706399

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinions

Opinion No. GA-0584

The Honorable James L. Keffer

Chair, Committee on Ways and Means

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

The Honorable Byron Cook

Chair, Committee on Civil Practices

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Nature of the offices of President Pro Tempore of the Texas Senate and Speaker of the Texas House of Representatives for purposes of removal from office (RQ-0589-GA)

S U M M A R Y

The Texas Constitution and state statutes are silent as to whether the President Pro Tempore of the Senate and the Speaker of the House are "officers of this State" for purposes of removal from office under article XV, section 7 of the Texas Constitution. Thus, any interpretation of this question must be governed by court decisions. The Texas Supreme Court has issued one opinion and adopted one opinion concerning article XV, section 7 removal--the *Dorenfield* and *Knox* cases. Although neither decision is a model of clarity, they are the best authority available.

In both *Dorenfield* and *Knox*, the courts found the officers in question--the San Antonio State Hospital Superintendent and a member of the Texas Review Commission--to be state officers. Although not purporting to lay out an exhaustive list of potential factors, the two decisions examined, *inter alia*, whether the officials' offices were created by law, whether the officers performed sovereign or governmental functions that affect the public as a whole and are continuing in their nature, whether they served terms fixed by law, and whether they took constitutional oaths of office.

Applying this analysis, we believe a court would likely conclude that the President Pro Tempore of the Senate is not a state officer. Although the President Pro Tempore's office is created by law and requires a constitutional oath, the office's relevant duties are primarily provisional in nature, having effect only in the absence of the Lieutenant Governor, and the term of office is not fixed by law.

Applying the same analysis, however, a court would likely conclude that the Speaker of the House is a state officer. The Speaker's office is created by the Texas Constitution. The Speaker performs numerous sovereign and governmental functions that affect the general public, including the substantial and ongoing statutory responsibility of serving as Joint Chair of the Legislative Budget Board. The Speaker most likely serves for a fixed term: his tenure explicitly begins when the House first assembles and temporarily organizes, and, due to his ongoing duties imposed by law, must continue until the next session commences. Finally, the Speaker takes the constitutional oath of office in addition to his oath as a House member.

The Texas Supreme Court has concluded that a Texas Review Commission member and the Superintendent of the San Antonio State Hospital are state officers. Given those holdings, we believe a court would likely conclude that the Speaker's substantial sovereign and governmental functions affecting the general public as a whole exceed those exercised by the Texas Review Commission member and the Superintendent of the San Antonio State Hospital and, as such, the Speaker is an officer of the state.

As a state officer, the Speaker is subject to impeachment under article XV, section 7 of the Texas Constitution. But the fact that the Speaker can be impeached under article XV, section 7 does not mean that impeachment is the *only* means of removing a Speaker.

At a minimum, both the Speaker and the President Pro Tempore are subject to expulsion under article III, section 11 of the Texas Constitution or exclusion under article XVI, section 2 of the Texas Constitution. Indeed, section 665.007 of the Government Code expressly provides that "the remedy of impeachment as provided in this chapter is *cumulative* of all other remedies regarding the impeachment or removal of public officers." TEX. GOV'T CODE ANN. §665.007 (Vernon 2004) (emphasis added). Accordingly, impeachment is not the only way to remove a Speaker.

If the Speaker were impeached, the Texas Constitution allows the impeachment judgment to extend to, but need not include, removal from office or disqualification from holding office. And if the Speaker were legally removed from office, article III, section 9(b) of the Texas Constitution--on its face--neither requires nor precludes the election of a new Speaker by the House.

Finally, this office will adhere to the Texas Constitution's separation of powers doctrine and longstanding precedent in declining to answer

questions requiring an interpretation of Senate and House Rules or questions regarding legislative parliamentary decisions.

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200706453

Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 19, 2007

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8063

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.8063, Reimbursement Methodology for Inpatient Hospital Services, in Title 1 of the Texas Administrative Code, Part 15, Chapter 355, Subchapter J, Division 4, Medicaid Hospital Services.

Background and Justification

The proposed amendment to §355.8063 updates the Medicaid reimbursement methodology for freestanding psychiatric facilities effective January 1, 2008. HHSC was directed by the Texas Legislature in the 2008 - 2009 General Appropriations Act (Conference Committee Report, Tex. H.B. 1, 80th Leg., R.S., ch. 1428, art. II-82 (2007)) to adopt a Medicaid reimbursement methodology for freestanding psychiatric facilities that is similar to the prospective payment system used by Medicare.

This proposed change in reimbursement methodology will allow the Medicaid program to take into account several factors used in the Medicare methodology that have an impact on the costs associated with providing inpatient psychiatric services in Texas. The reimbursement methodology uses the Medicare federal base rate as the basis for computing a facility-specific per diem rate with several adjustments for factors that influence the cost of care. These adjustments include a rural adjustment, which recognizes the higher costs incurred by hospitals outside urban areas; a length of stay adjustment that takes into account the higher costs of care for hospitalizations that have a shorter length of stay; and a wage adjustment that takes into account the cost of wages specific to county location.

Section-by-Section Summary

HHSC proposes amending subsection (w) to update the reimbursement methodology for freestanding psychiatric facilities by removing language related to the current process of using a facility's cost report as a basis for determining rates and adding language describing the proposed methodology. The proposed methodology uses a Medicare federal base per diem rate with facility-specific adjustments for wages, rural location, and length of stay. Medicaid provides this benefit for clients under 21 years of age, and the proposed rule amendment clarifies the fact that these rates are for Medicaid clients under 21. The rule amendment also clarifies that these per diem rates will be increased only if the Texas Legislature appropriates funds for this purpose.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that the fiscal impact to government will be $12,971,791 per year with the state being responsible for $3,408,987 in 2008, $5,132,938 in 2009, $5,134,235 in 2010, $5,134,235 in 2011, and $5,134,235 in 2012. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Carolyn Pratt, Director of Rate Analysis, has determined that there is no adverse economic effect on small businesses or micro-businesses, as a result of enforcing or administering the amendment. HHSC does not anticipate that there will be any economic costs to persons who are required to comply with the proposed amendment. HHSC does not anticipate any negative impact on local employment.

Public Benefit

Ms. Pratt has determined that for each year of the first five years the amendment is in effect, the anticipated public benefit, as a result of enforcing the section, will be to adopt a Medicaid reimbursement methodology for freestanding psychiatric facilities that is similar to the Medicare methodology and that takes into account many factors that impact costs associated with providing inpatient psychiatric services in Texas.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environment exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environment exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Amber Lovett, by mail at HHSC Rate Analysis-Hospital Services, Mail Code H-400, P.O. Box 85200, Austin, Texas, 78708, by fax to (512) 491-1998, or by e-mail to amber.lovett@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursement.

The proposed amendment affects Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8063. Reimbursement Methodology for Inpatient Hospital Services.

(a) - (v) (No change.)

(w) Reimbursement to freestanding psychiatric facilities. Effective January 1, 2008 [~~November 1, 2006~~], HHSC or its designee reimburses freestanding psychiatric facilities under the prospective payment system, a hospital-specific per diem rate. The per diem rate will be determined based upon the Medicare federal base per diem for inpatient psychiatric facilities with facility-based adjustments for wages, rural location, and length of stay as determined by Medicare, to the extent possible within available funds. [~~facility's most recent tentative or final Medicaid cost report.~~] HHSC or its designee will not cost settle for services provided to recipients admitted as inpatients to freestanding psychiatric facilities reimbursed under the prospective payment system on or after the implementation date of the prospective payment system. The freestanding psychiatric inpatient per diem rates are for Medicaid clients under 21 years of age. Per diem rates will be increased only if the Texas Legislature appropriates funds for this specific purpose.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706322
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 424-6900

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CHAPTER 358. MEDICAID ELIGIBILITY
SUBCHAPTER D. RESOURCES

1 TAC §358.432, §358.444

Pursuant to Senate Bill (S.B.) 22, 80th Legislature, Regular Session, 2007, amending Subchapter C, Chapter 32 of the Human Resources Code, the Texas Health and Human Services Commission (HHSC) proposes to add the Partnership for Long-term Care Program, to its Medicaid Eligibility chapter. HHSC proposes an amendment to §358.432, concerning Home Equity Treatment and proposes new §358.444, concerning Medicaid Treatment of Qualified Long-Term Care Partnership Program Insurance Policies. The purpose of this new rule and amendment is to implement a Long-Term Care Partnership Program.

Background and Justification

Section 32.061 of the Human Resources Code, as amended by the 80th Texas Legislature during its regular session, authorizes the Texas Health and Human Services Commission (HHSC) to implement a Long-Term Care Partnership Program which will enable individuals who purchase certain approved private long-term care insurance policies to have a dollar-for-dollar exclusion of their resources in an amount equal to the insurance benefits paid on behalf of the individual in determining eligibility for medical assistance. HHSC proposes to amend its Medicaid Eligibility chapter by adding a new rule to Subchapter D, Title 1, Chapter 358 of the Texas Administrative Code to be consistent with Section 6021 of the federal Deficit Reduction Act of 2005. The purpose of the amendment is to adopt a rule for the Long-Term Care Partnership Program.

Section-by-Section Summary

Section 358.432 sets forth the eligibility requirements related to home equity treatment and HHSC proposes to revise that section to clarify that a Long-term Care Partnership program disregard cannot offset or reduce a home equity interest that exceeds $500,000. HHSC also proposes to amend this section to state that HHSC may waive certain home equity limitations in limited circumstances. HHSC proposes other clarifying wording changes to this section.

HHSC proposes to add new §358.444, Medicaid: treatment of approved long- term care insurance policies which sets forth the requirements of the Long-Term Care Partnership Program.

Fiscal Note

Tom Suehs, Deputy Commissioner for Financial Services, has determined that during the first five-year period the proposed rules are in effect there will be a one-time cost in FY09 of $830,220 in General Revenue and $1,660,440 All Funds. The proposed rules will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the proposal as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Public Benefit

Anne Heiligenstein, Deputy Executive Commissioner for the Office of Social Services, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from the adoption of the proposed rules. The anticipated public benefit, as a result of enforcing the proposed rules, will be

the potential for an increased resource disregard at application and from the Medicaid Estate Recovery Program (MERP).

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Bridgette McEntire at MC-2090, 909 West 45th Street, Austin, TX 78751, by fax to (512) 206-5211 or by e-mail to Bridgette.McEntire@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for January 14, 2008 from 9:00 A.M. to 10:30 A.M. (central time) in the public hearing room of the Texas Department of Aging and Disability Services (DADS), 701 West 51st Street, Austin, TX. Persons requiring further information, special assistance, or accommodations should contact Kyna Belcher at (512) 491-1884.

Statutory Authority

The amendment and new rule are proposed under Subchapter C, Chapter 32, Human Resources Code, which provides the Executive Commissioner of HHSC with rulemaking authority; and the Texas Government Code, §531.021(a), which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed rules affect the Human Resources Code, Subchapter C, Chapter 32, Chapter 1651, Insurance Code, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.432. Home Equity Treatment.

[~~(Home Equity and Eligibility for Medical Assistance with Respect to Services--The Commission is required under the provisions of the Social Security Act (SSA) §1917(f) (codified at 42 U.S.C 1396p(f))~~]

(a) [~~(1)~~] For individuals who are determined eligible for medical assistance with respect to nursing facility services or other long-term care services as described in the Social Security Act (SSA) §1917(c)(1) (codified at 42 U.S.C 1396p(c)(1)) based on an application filed on or after January 1, 2006--

(1) [~~(A)~~] Despite any other provision of the Social Security Act (SSA) §1917 (codified at 42 U.S.C 1396p), subject to paragraph (2) of this subsection and subsection (b) of this section [~~subparagraph (B) of this paragraph and paragraph (2) of this subsection~~], the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds $500,000.

(2) [~~(B)~~] The dollar amounts specified in this paragraph shall be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers (all items; United States city average), rounded to the nearest $1,000.

(b) [~~(2)~~] Subsection (a) of this section [~~Paragraph (1) of this subsection~~] shall not apply with respect to an individual if--

(1) [~~(A)~~] The spouse of such individual, or

(2) [~~(B)~~] Such individual's child who is under age 21, or [~~(with respect to States eligible to participate in the State program established under title XVI)~~] is blind or permanently and totally disabled, or [~~(with respect to States which are not eligible to participate in such program) is blind or disabled~~] as defined in SSA §1614 (codified at 42 U.S.C 1382c), is lawfully residing in the individual's home.

(c) [~~(3)~~] Nothing in this section [~~subsection~~] shall be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.

(d) [~~(4)~~] HHSC may waive subsection (a) of this section in the case of demonstrated hardship consistent with the guidelines set forth by the [~~The~~] Secretary of the United States Department of Health and Human Services [~~shall establish a process whereby paragraph (1) of this subsection is waived in the case of a demonstrated hardship~~].

(e) A Long-Term Care Partnership Program disregard set forth in §358.444 of this title (relating to Medicaid Treatment of Qualified Long-Term Care Partnership Program Insurance Policies) cannot offset or reduce home equity interest for the purposes of subsection (a)(1) of this section.

§358.444. Medicaid Treatment of Qualified Long-Term Care Partnership Program Insurance Policies.

This rule describes the Long-Term Care Partnership Program under which an individual's resources are disregarded in the eligibility determinations equal to the amount of benefits paid to or on behalf of the consumer by a Long-term Care Partnership policy.

(1) Definitions.

(A) The Long-Term Care Partnership Program is administered by the Texas Health and Human Services Commission (HHSC).

(B) "Long-Term Care Partnership Program" means the program established under the Human Resources Code, Chapter 32, Subchapter C.

(C) "Qualified plan holder" means the beneficiary of a qualified long-term care benefit plan that meets the requirements set forth in paragraph (2) of this section.

(D) "Resource disregard" means the total equity value of resources not exempt under rules governing Medicaid eligibility that are disregarded in determining eligibility for Medicaid.

(E) "Resource protection" means the extension to a plan holder of an approved plan of a dollar-for-dollar resource disregard in determining Medicaid eligibility.

(F) "Dollar-for-dollar resource disregard" means a resource disregard in which the amount of the disregard is equal to the sum of benefit payments made on behalf of the approved plan holder.

(2) A Long-Term Care Partnership Program policy is one that meets all of the following requirements.

(A) On the date the policy was issued, the state in which the insured resided had in place an approved Medicaid state plan amendment under 42 U.S.C. 1396p(b).

(B) The policy meets the requirements set forth by the Texas Department of Insurance under Title 28, Part 1, Chapter 3 of the Texas Administrative Code (relating to Life, Accident and Health Insurance and Annuities).

(3) At application for long-term care services, the qualified plan holder will receive a dollar-for-dollar disregard of the individual's resources.

(A) HHSC shall determine Medicaid eligibility in accordance with the eligibility rules contained in Chapter 358 of this title (relating to Medicaid Eligibility).

(B) An individual may apply for long-term care services before exhausting the benefits of a Long-Term Care Partnership Program policy. If an individual applies for and is eligible to receive Medicaid before the Long-Term Care Partnership Program policy is exhausted, the Long-Term Care Partnership Program insurer must make payment for medical assistance to the maximum extent of its liability before Medicaid funds may be used to pay providers for covered services as established in Chapter 358 of this title (relating to Medicaid Eligibility).

(C) If an individual has applied for and been found eligible to receive Medicaid and subsequently receives additional resources, the individual continues to be eligible for Medicaid if the total resources do not exceed the individual resource limit after applying the dollar-for-dollar resource disregard.

(4) If the Long-Term Care Partnership Program is discontinued, an individual who purchased a Partnership for Long-term Care Program policy before the date the program is discontinued remains eligible to receive the dollar-for-dollar resource exclusion.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706321
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

SUBCHAPTER B. REGULATION OF LICENSES

7 TAC §25.25

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission), on behalf of the Department of Banking (department), proposes the repeal of §25.25, concerning conversion from trust to insurance funded benefits. The commission is simultaneously proposing new §25.25 concerning the same subject in this issue of the *Texas Register*.

Finance Code, Chapter 154 (Chapter 154), and rules adopted under Chapter 154, codified in Title 7, Chapter 25 of the Texas Administrative Code, provide an exclusive regulatory framework that allows a person in this state to arrange and pay for a funeral in advance. Chapter 154 imposes a duty upon the department and grants the department the authority to license and regulate sellers of prepaid funeral benefits to ensure that prepaid funeral benefits contracts (prepaid contracts) are performed and funded in accordance with their terms at the time of need.

Existing prepaid contracts for trust-funded prepaid funeral benefits may be converted to insurance-funded prepaid funeral benefits under Finance Code, §154.204, and 7 TAC §25.25 if the department finds that the proposed insurance-funded arrangement safeguards the rights and interests of the individuals who purchased the prepaid contracts to substantially the same degree as the trust-funded arrangement proposed to be replaced. Because of the extent of the proposed revisions to §25.25, the commission is proposing a new §25.25, rather than amendments to the existing section. The repeal will not be adopted unless new §25.25 is adopted.

Stephanie Newberg, Deputy Commissioner of the Texas Department of Banking, has determined that, for each of the first five years the proposed repeal is in effect, there will be no fiscal implication for state or local governments. Ms. Newberg has further determined that, for each year of the first five years that the proposed repeal is in effect, the anticipated public benefit will be the deletion of duplicative regulations. The repealed section will be replaced with updated and more specific and understandable regulations that are consistent with the department's current interpretation and application of Finance Code, §154.204, and that will enhance the department's enforcement of, and insurance permit holders' compliance with, the regulatory requirements of Chapter 154. For each year of such first five years, there will be no economic cost to persons required to comply with the proposed repeal. Finally, Ms. Newberg has determined that the proposed repeal will not have an adverse effect upon small businesses or micro-businesses.

To be considered, comments on the proposed repeal must be submitted no later than 5:00 p.m. on February 28, 2008. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

The repeal of existing §25.25 is proposed under Finance Code, §154.204, which provides for department approval of a conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits to safeguard the rights and interests of the individual who purchases a prepaid funeral benefits contract, and under Finance Code, §154.051, which authorizes the commission to adopt rules relating to the enforcement and administration of Chapter 154.

Finance Code, §154.204, is affected by the proposed repeal.

§25.25. Conversion from Trust to Insurance Funded Benefits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706381
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: April 18, 2008
For further information, please call: (512) 475-1300

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7 TAC §25.25

The Finance Commission of Texas (commission), on behalf of the Department of Banking (department), proposes new §25.25, concerning conversion from trust-funded to insurance-funded benefits under Finance Code, §154.204. The proposed new section is designed to replace existing §25.25, concerning conversion from trust to insurance funded benefits, which the commission is simultaneously proposing for repeal in this issue of the *Texas Register*.

Finance Code, Chapter 154 (Chapter 154), and rules adopted under Chapter 154, codified in Title 7, Chapter 25 of the Texas Administrative Code, provide an exclusive regulatory framework that allows a person in this state to arrange and pay for a funeral in advance. Chapter 154 imposes a duty upon the department and grants the department the authority to license and regulate sellers of prepaid funeral benefits to ensure that prepaid funeral benefits contracts (prepaid contracts) are performed and funded in accordance with their terms at the time of need.

Existing prepaid contracts for trust-funded prepaid funeral benefits may be converted to insurance-funded prepaid funeral benefits under Finance Code, §154.204, if the department finds that the proposed insurance-funded arrangement safeguards the rights and interests of the individuals who purchased the prepaid contracts (purchasers) to substantially the same degree as the trust-funded arrangement proposed to be replaced. Existing §25.25 specifies the required content of an application for conversion and the standards that must be satisfied before the application can be approved by the department. Since the original adoption of existing §25.25 in 1996, developments have outpaced its requirements. Most notably, licensed sellers of insurance-funded prepaid funeral benefits are now either insurance companies or affiliates of insurance companies that sell through designated funeral providers acting as agent, both for the seller with respect to the contract, and for the insurance company with respect to the funding insurance policy. Insurance companies that wish to participate in the Texas preneed market will often form a subsidiary to acquire a license under Chapter 154. An increasing number of these affiliate sellers resist accepting responsibility for the ultimate delivery of the contracted funeral, disclaim guaranteed pricing, and assert the primacy of the Insurance Code in an attempt to avoid regulatory compliance.

As a result, proposed new §25.25 provides that the department delve more deeply into the business plan and financial condition of the post-conversion permit holder. The application for conversion must demonstrate that the post-conversion permit holder has or will have access to the financial and other resources necessary to discharge its contractual and statutory obligations as a permit holder, and that the post-conversion permit holder recognizes its future responsibilities to administer its unmatured contracts until finally performed, to verify that each contract is performed and funded in accordance with its terms and Chapter 154, and to maintain the records required under 7 TAC §25.10.

Further, proposed new §25.25 will tighten standards for ensuring that purchasers receive appropriate and informative notice of a conversion, as required by Finance Code, §154.204, in a manner that will allow a purchaser to make an informed decision regarding whether to remain in the trust-funded prepaid funeral benefits arrangement.

Proposed §25.25(a) sets forth definitions applicable to 25.25. Proposed §25.25(b) describes the general standards and eligibility requirements that the department will apply in evaluating whether a proposed conversion will safeguard the rights and interests of the purchasers to substantially the same degree as the trust-funded benefits arrangement sought to be replaced, as required by Finance Code, §154.204. The required content of an application for conversion is prescribed by proposed §25.25(c) in 17 numbered paragraphs.

Proposed subsection (d) describes how the department will process an application, and proposed §25.25(e) sets forth the standard conditions that will be imposed by an order approving conversion.

Consistent with established practice, the department provided a draft of the proposed revisions to §25.25 to potentially affected permit holders and attorneys known to practice before the department in this area inviting informal comment. The department made several revisions to the proposal draft in response to the submitted comments. Although the department has attempted to be sensitive to concerns expressed by insurance-funded permit holders regarding regulatory burden and has sought to reduce application requirements to the extent possible, the requirements of proposed new §25.25 continue to reflect the department's longstanding interpretation and application of Finance Code, §154.204, that the proposed insurance-funded arrangement must safeguard the rights and interests of purchasers to substantially the same degree as the trust-funded arrangement sought to be replaced. Among other matters, unless the applicant demonstrates to the satisfaction of the department that the insurance-funded contracts will be performed and funded in compliance with their terms and Chapter 154, and that the permit holder will maintain or have access to the records the department requires to determine such compliance, the department will not be able to conclude that the rights and interests of purchasers will be safeguarded by the proposed insurance-funded arrangement to substantially the same degree as the existing trust-funded arrangement, and the application for conversion will not be approved.

Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the section is in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the section. Ms. Newberg has further determined that, for each year of the first five years that the proposed new section is in effect, the anticipated public benefit will be updated and more specific and understandable regulations that will enhance the department's enforcement of, and insurance permit

holders' compliance with, the regulatory requirements of Chapter 154 and the specific requirements of Finance Code, 154.204. For each year of such first five years, there will beno economic cost to persons required to comply with the proposed new section. Finally, Ms. Newberg has determined that the proposal will not have an adverse economic effect upon small businesses or micro-businesses.

To be considered, comments on the proposed new section must be submitted no later than 5:00 p.m. on February 28, 2008. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by e-mail to legal@banking.state.tx.us.

New §25.25 is proposed under Finance Code, §154.204, which provides for department approval of a conversion from trust-funded prepaid funeral benefits to insurance-funded prepaid funeral benefits to safeguard the rights and interests of the individual who purchases a prepaid funeral benefits contract, and under Finance Code, §154.051, which authorizes the commission to adopt rules relating to the enforcement and administration of Chapter 154.

Finance Code, §154.204, is affected by the proposed new section.

§25.25. Conversion from Trust-Funded to Insurance-Funded Benefits.

(a) Definitions. Definitions of words and terms in Finance Code, §154.002, are incorporated in this section by reference. The following words and terms have the following meanings when used in this section, unless the context clearly indicates otherwise.

(1) Aggregate trust funds--The trust funds to be transferred with respect to an individual prepaid contract as of the transfer date, comprised of the paid-in principal plus the earnings attributable to that prepaid contract. As the context may require, the term also refers to the sum of the aggregate trust funds for all prepaid contracts subject to conversion.

(2) Applicant--A permit holder under Finance Code, Chapter 154, who files an application under this section.

(3) Conversion--A transaction under Finance Code, §154.204, and this section, to convert all outstanding trust-funded prepaid funeral benefits under existing prepaid contracts administered by the applicant to insurance-funded prepaid funeral benefits to be administered by the post-conversion permit holder after conversion.

(4) Insurance company--The insurance company designated in an application filed under this section to issue the annuities required for the conversion. The insurance company may also be the post-conversion permit holder if permitted under applicable insurance law and regulations.

(5) Paid-in principal--The amount required to be deposited in trust by the applicant with respect to an individual prepaid contract pursuant to Finance Code, §154.253. As the context requires, the term may also refer to the total amount deposited in trust by the applicant for all prepaid contracts.

(6) Post-conversion permit holder--The permit holder designated in an application filed under this section to hold and administer the prepaid contracts after conversion. The post-conversion permit holder may also be the insurance company if permitted under applicable insurance law and regulations.

(7) Prepaid contract--A contract for prepaid funeral benefits under Finance Code, Chapter 154.

(8) Purchaser--An individual who purchased a trust-funded prepaid contract that is the subject of an application filed under this section.

(9) TDI--Texas Department of Insurance.

(10) Unpaid principal balance--The unpaid portion of the purchase price of a prepaid contract.

(b) Standards for approval and eligibility. The department will not approve a proposed conversion unless the following general requirements have been met.

(1) Standards for approval. The proposed insurance-funded benefits arrangement must safeguard the rights and interests of the purchasers to substantially the same degree as the trust-funded benefits arrangement sought to be replaced, as provided by Finance Code, §154.204, and this section. An application may be approved or denied without the necessity of a hearing, subject to the right of the applicant or the post-conversion permit holder to request a hearing. Without limiting its ability to consider any matter relevant to the determination of substantial equivalency, the department will not approve a proposed conversion unless:

(A) the form(s) of insurance policy proposed for use in the conversion is a single or flexible premium deferred fixed (not variable) annuity that is structured to protect and preserve the existing rights and interests of the purchaser, including the amount of funds the purchaser would be entitled to receive upon cancellation of the prepaid contract and the amount of funds payable upon maturity of the prepaid contract;

(B) the proposed form of annuity provides for growth of the cancellation or death benefit that is reasonably designed to reduce the impact of inflation on the cost of providing a funeral under a prepaid contract at the time of its maturity;

(C) the post-conversion permit holder directly or indirectly controls, is controlled by, or is under common control with the insurance company;

(D) neither the applicant nor the post-conversion permit holder have a record of noncompliance with respect to the requirements of Finance Code, Chapter 154, and this chapter, as evidenced by paragraph (2) of this subsection;

(E) the post-conversion permit holder accepts responsibility for verifying that the prepaid contracts proposed for conversion are performed and funded in accordance with their terms, and undertakes to maintain the records the department requires to determine compliance with Finance Code, Chapter 154, and this chapter; and

(F) the post-conversion permit holder demonstrates the organizational and financial capability to discharge its accepted responsibilities.

(2) Eligibility. At the time the application is filed, processed and approved, the applicant and the post-conversion permit holder must each be in good standing with the department. To be in good standing with the department, the department's most recent report of examination of either permit holder must not cite any violation of applicable laws and regulations or other material deficiencies that have not been remedied or corrected to the satisfaction of the department, and the permit holder must not be delinquent with respect to any fees or filings due to the department. Within 45 days after an application for conversion is filed with the department, the department may conduct an examination of the applicant or the post conversion permit holder or both before approving or denying the application if an examination has not been conducted within the preceding 12 months

or for the purpose of verifying that previously cited violations or other deficiencies have been satisfactorily eliminated or corrected.

(c) Contents of application. An application for conversion must respond to each paragraph of this subsection by number. Overlapping or duplicate responses may be cross-referenced for brevity.

(1) Letter requesting conversion. The applicant shall submit a letter to the commissioner, signed by a duly authorized officer, that:

(A) requests approval of the conversion of the applicant's prepaid contracts;

(B) requests authorization to transfer responsibility for the prepaid contracts to the post-conversion permit holder;

(C) summarizes the amount of aggregate trust funds by depository and account number and the component amounts of paid-in principal and earnings, and requests authorization to transfer the aggregate trust funds from the currently approved depository or trustee to the insurance company;

(D) represents that the applicant is in compliance with Finance Code, §154.301, regarding prepaid contracts presumed to be abandoned, and has filed the reports and delivered funds as required by Finance Code, §154.304; and

(E) if the applicant is not an individual, includes a certified resolution of the applicant's board authorizing the conversion, the application, and the execution of related documents by the submitting officer.

(2) Agreement regarding conversion. The applicant must submit an original, signed copy of the agreement among the applicant, the post-conversion permit holder, and the insurance company regarding the transfer, receipt, and application of trust funds upon conversion that, among other matters, contains the following provisions:

(A) agreement of the parties that all prepaid contracts of the applicant in existence as of the date of the application will be subject to conversion, excluding prepaid contracts that are presumed abandoned under Finance Code, §154.301;

(B) agreement of the insurance company that:

(i) the formula for determining the cash surrender value or cancellation benefit of each annuity to be issued in the conversion will be at least as generous to the purchaser as the formula that would have applied under Finance Code, §154.155, had the prepaid contract not been converted from trust-funded to insurance-funded;

(ii) the face amount of the fully-paid annuity to be issued with respect to each prepaid contract will not be less than the amount of aggregate trust funds transferred for that prepaid contract;

(iii) for any prepaid contract which is not fully paid, the face amount of the supplemental annuity to be issued may not be less than the unpaid principal balance, and no credit or reduction will be applied to the unpaid principal balance for earnings attributable to paid-in principal under the prepaid contract;

(iv) upon request, a copy of the specifications page of the funding annuity or annuities will be furnished to the purchaser of the prepaid contract to be funded; and

(v) no commissions or other compensation will be paid out of or deducted from the aggregate trust funds to be transferred in the proposed conversion.

(C) agreement of the post-conversion permit holder with respect to the converted prepaid contracts to:

(i) maintain all records required by §25.10 of this title (relating to Recordkeeping Requirements for Insurance-Funded Contracts);

(ii) monitor and verify that each death or cancellation benefit claim under a converted prepaid contract is paid in accordance with Finance Code, Chapter 154, and this chapter;

(iii) monitor and verify that each prepaid contract is performed by the funeral provider at maturity in accordance with its terms;

(iv) verify that any additional charges imposed by the funeral provider and collected from the decedent's representatives are for additional services or merchandise not otherwise contemplated by and funded under the prepaid contract and, if not, promptly refund prepaid contract overcharges to the decedent's representatives; and

(v) if within the five-year period following approval of the conversion a purchaser presents a fully executed prepaid contract that was not listed in the applicant's pre-conversion or post-conversion summaries and provides proof of payments made on the contract, take action to cause the insurance company to issue one or more annuities with respect to the previously omitted prepaid contract as if it had originally been included in the conversion or, if cancellation is requested by the purchaser, pay or take action to cause the purchaser to be paid the cancellation benefit due, provided that the obligation imposed by this clause is limited to the greater of $5,000 or 5.0% of the aggregate trust funds transferred; and

(D) disclosure of the estimated total commissions and other compensation to be paid by the insurance company in connection with the conversion, including the percentage and dollar amount of the commissions and the full name and TDI license number of each insurance agent that will receive commissions.

(3) Agreement of post-conversion permit holder and applicant. If the applicant is the funeral provider designated in the prepaid contracts to be converted, the applicant must submit a written agreement between the post-conversion permit holder and the applicant that, at a minimum:

(A) sets forth the nature and scope of the relationship between the permit holder and the applicant as funeral provider and the respective rights and responsibilities of the parties with respect to the prepaid contracts to be converted;

(B) requires the applicant to relinquish the individual prepaid contract ledgers formerly maintained by the applicant under §25.11 of this title (relating to Record Keeping Requirements for Trust-Funded Contracts) and obligates the post-conversion permit holder to maintain such ledgers to reflect the paid-in principal and the unpaid principal balance under each converted prepaid contract;

(C) requires the applicant to perform and deliver the funeral benefits under a prepaid contract in accordance with its terms;

(D) requires the applicant to provide the post-conversion permit holder with the documentation necessary to enable the permit holder to maintain the records required by Finance Code, Chapter 154, and §25.10 of this title; and

(E) obligates the parties to protect any nonpublic personal financial or health information of the purchaser and beneficiary under the prepaid contract in compliance with applicable law.

(4) Agreement of post-conversion permit holder and insurance company. If the proposed post-conversion permit holder is not the insurance company, the applicant must submit a written agreement between the post-conversion permit holder and the insurance company

that, at a minimum, requires the insurance company to provide the post-conversion permit holder with the documentation necessary to enable the permit holder to maintain the records required by §25.10 of this title. The agreement must also obligate the parties to protect any nonpublic personal financial or health information of the purchaser and beneficiary under each converted prepaid contract and the owner and insured under each annuity issued in the proposed conversion in compliance with applicable law.

(5) Commitment of insurance company. If the post-conversion permit holder is not the insurance company and is unable to independently demonstrate that it has the organizational and financial resources to discharge its permit holder responsibilities, or otherwise intends to rely on the insurance company to provide such resources, the applicant must submit the written commitment of the insurance company or its insurance holding company to the department to take all necessary steps to maintain the existence of the post-conversion permit holder and provide adequate resources to the post conversion permit holder to enable it to maintain the capital and liquidity reasonably deemed necessary by the department to discharge the post conversion permit holder's responsibilities under Finance Code, Chapter 154, and this chapter.

(6) Form of annuity. The applicant must submit a copy of the form(s) of annuity proposed to be issued as part of the conversion. The submitted form(s) must be accompanied by a copy of the TDI notice of action approval letter. The applicant and not TDI is responsible for ensuring that the form of annuity complies with this section. Among other matters, the annuity must:

(A) provide guaranteed growth of the death benefit of no less than 2.0% compounded annually on gross premiums paid beginning in the first year of the policy, provided that the guaranteed growth of the death benefit must be no less than 3.0% for applications filed on or after January 1, 2009;

(B) provide a cash surrender value that at all times prior to maturity of the prepaid contract equals or exceeds the cancellation benefit that would have applied to the prepaid contract under Finance Code, §154.155, had the prepaid contract not been converted from trust-funded to insurance-funded;

(C) provide a death benefit for the duration of the prepaid contract that equals the sum of the aggregate trust funds transferred at conversion, all future premiums paid, and accumulated growth thereon as provided by subparagraph (A) of this paragraph (6), provided that the death benefit can never be less than the amount that would have been available under the prepaid contract on the date of conversion had the prepaid contract not been converted from trust-funded to insurance-funded; and

(D) not include any provision that allows for contesting coverage or limiting death benefits, refers to or requires a physical examination, or otherwise operates as an exclusion, limitation, or condition on payment of death benefits other than provisions requiring submission of proof of death or surrender of the annuity at the time the annuity matures or is canceled.

(7) Federal income tax treatment. The applicant must submit a written summary describing the pre-conversion, federal income tax status of the purchasers' trusts, in the aggregate, as either qualified funeral trusts under 16 U.S.C. §685 or grantor trusts, for each of the preceding three taxable years. Disclosure of differing treatment of individual purchaser trusts is not required if the summary identifies and quantifies the percentage of purchaser trusts treated as grantor trusts and as qualified funeral trusts. The applicant must also describe the post-conversion manner in which taxable income arising from the annuities will be reported for federal income tax purposes.

(8) Past performance. The applicant must submit a historical comparison of the average annual rate of growth in the death benefit under the form of annuity proposed to be issued by the insurance company (or a substantially similar form) with the average annual rate of growth in the aggregate trust funds, based on stated assumptions and calculation methods, expressed as a percentage for the most recent five-year period and for each year of the five-year period. In general, subject to stated reasonable adjustments for the purpose of enhancing comparability:

(A) the annual growth under the annuity equals the growth rate credited by the insurance company to the death benefit for the year; and

(B) the annual growth in the aggregate trust funds equals the sum of accrued net income and gains during the year plus the net increase in market value of investments held.

(9) Form of assignment. The applicant must submit a copy of the form of assignment, if any, to be used in assigning annuity rights or proceeds to the post-conversion permit holder.

(10) Qualifications of post-conversion permit holder. With respect to the post-conversion permit holder, the applicant must submit:

(A) if the proposed post-conversion permit holder is not also the insurance company, a copy of the post-conversion permit holder's most recent annual financial statements and the most current year-to-date financial statements;

(B) a list of all previous conversions in this state accepted by the post-conversion permit holder and, with respect to each conversion, the date of the order approving the conversion and the date that the converted prepaid contracts were formally transferred to the post-conversion permit holder;

(C) a summary of the number and aggregate purchase price of all prepaid contracts administered by the post-conversion permit holder as of the end of the immediately preceding calendar year;

(D) a description of how the prepaid contracts to be converted will be administered by the post-conversion permit holder, including a description of activities or functions, other than delivery of funeral services and merchandise by the designated funeral provider, that will be outsourced and the contractor that will perform such activities or functions; and

(E) if any contractor named in response to subparagraph (D) of this paragraph directly or indirectly controls, is controlled by, or is under common control with the post-conversion permit holder, a summary of the contracting relationship for each of the preceding three fiscal years that includes a description of the services performed and the compensation paid by the post-conversion permit holder.

(11) Qualifications of insurance company. With respect to the insurance company, the applicant must submit:

(A) a letter from TDI, dated not more than 60 days prior to the date the application is filed, that effectively represents that the insurance company is in good standing and currently authorized to conduct the business of insurance in this state;

(B) to the extent available, a list of the current financial strength ratings of the insurance company determined by A.M. Best Company, Standard & Poor's, Wiess Research, Duff & Phelps, and Moody's Investors Service; and

(C) a list of all previous conversions in this state that were funded by the insurance company and, with respect to each conversion, the date of the order approving the conversion and the date that trust funds were formally transferred to the insurance company.

(12) Notification letters. The applicant must submit a copy of each notification letter proposed to be sent to each purchaser, whether from the applicant, the post-conversion permit holder, or the insurance company. At least one notification letter must be sent by certified mail and must include, among other matters:

(A) notice of the conversion and the change in depositories;

(B) if the pre-conversion trustee elected to treat the trust as a qualified funeral trust under 16 U.S.C. §685 for any of the preceding three taxable years, notice that the trustee will no longer be liable for payment of federal income taxes and a description of the manner in which taxable income arising from the annuities will be reported in the future for federal income tax purposes;

(C) if the prepaid contract permits changing the beneficiary, notice that the beneficiary may no longer be changed after the funding annuity is issued;

(D) notice of the purchaser's right to decline the conversion and remain in the existing trust-funded funeral benefit arrangement by filing a written request with the department within 60 days; and

(E) notice that the purchaser may request a copy of the specifications page of the funding annuity.

(13) Pre-conversion summary. The applicant must submit a pre-conversion summary pertaining to each prepaid contract to be converted, determined as of a date no earlier than 30 days prior to the date the application is filed, with totals for all prepaid contracts to be converted, if applicable, addressing each of the following categories:

(A) name and, if available, date of birth of the purchaser;

(B) date of contract;

(C) contract purchase price;

(D) paid-in principal;

(E) unpaid principal balance, if any;

(F) accumulated earnings;

(G) cancellation benefit due to the purchaser, assuming cancellation were to occur on the calculation date;

(H) amount eligible to be withdrawn from the trust fund by the applicant upon death of the prepaid contract beneficiary, assuming death were to occur on the calculation date; and

(I) amount retained by the applicant under Finance Code, §154.252.

(14) Pro forma post-conversion summary. The applicant must submit a pro forma post-conversion summary pertaining to each prepaid contract as if converted, determined as of the same date as the pre-conversion summary, with totals for all prepaid contracts, if applicable, addressing each of the following categories:

(A) name of annuitant;

(B) contract purchase price;

(C) paid-in principal;

(D) unpaid principal balance, if any;

(E) the amount of transferred trust funds applied to the premium for the annuity;

(F) amount retained by the applicant under Finance Code, §154.252;

(G) cash surrender value of each annuity, assuming the annuity were to be surrendered on the calculation date; and

(H) death benefit under each annuity, assuming death were to occur on the calculation date.

(15) Voluntary cancellation of permit. If the applicant will not sell trust-funded prepaid contracts or administer previously sold trust-funded prepaid contracts after the conversion, the applicant must submit a completed form to voluntarily cancel its trust-funded permit. The applicant's voluntary cancellation will not be processed unless the conversion is approved, and will not be effective until the department completes the close-out examination of the applicant.

(16) Application fee. In connection with an application submitted under this section, the applicant must submit the conversion application fee required by §25.23 of this title (relating to Application Fees).

(17) Side agreements. To the extent not otherwise required by this subsection, the applicant must submit copies of any other agreements between or among the applicant, the post-conversion permit holder, and/or the insurance company that contain contractual provisions addressing any aspect of the proposed conversion.

(d) Consideration of application; hearing. If the application is deficient, the department may require any person connected with the proposed conversion to submit additional information. An application may be approved or denied without the necessity of a hearing, subject to the right of the applicant or the post-conversion permit holder to request a hearing.

(1) Conditions in order approving conversion. An order approving conversion will impose certain conditions that are not subject to objection, as described in subsection (e) of this section. The order may also impose other, nonstandard conditions specific to the conversion at issue. The applicant or the post-conversion permit holder must submit a written request for hearing pursuant to paragraph (2) of this subsection if any nonstandard condition in the order is objectionable, in which case the order is deemed to be a denial. Consummation of the conversion transaction constitutes confirmation of acceptance by the applicant, the post-conversion permit holder, and the insurance company of any conditions imposed by the order and is considered for all purposes an agreement with the department enforceable against the applicant, the post-conversion permit holder, and the insurance company.

(2) Hearing. The applicant or the post-conversion permit holder may file a written request for hearing with the commissioner on or before the 30th day after the date of the order denying the application, or an order imposing nonstandard conditions objectionable to the applicant or the post-conversion permit holder, stating with specificity the reasons the applicant alleges that the decision of the department is in error. The request for hearing will be forwarded to the administrative law judge who must enter appropriate orders and conduct the hearing on or before the 60th day after the date the request for hearing was received, or as soon as is otherwise reasonably possible, under Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings) and Government Code, Chapter 2001. The applicant or the post-conversion permit holder has the burden of proof to demonstrate that the proposed insurance-funded prepaid funeral benefits safeguards the rights and interests of each affected purchaser to substantially the same degree as the existing trust-funded prepaid funeral benefits sought to be replaced. A denial of an application may not be appealed until a final order is issued.

(e) Standard conditions in order approving conversion. An order approving conversion will impose five required conditions that are not subject to objection. Failure to satisfy any of these conditions constitutes a violation of an order of the commissioner subject to possible enforcement action under Finance Code, Chapter 154.

(1) The order approving conversion will prohibit issuance of the annuities prior to the expiration of the time period for a purchaser to decline conversion, except that the annuities may be issued prior to that date if expiration of the time period to decline conversion will occur during the free look period or if a purchaser electing to decline conversion will not be required to pay an early withdrawal penalty for cancellation of the annuity.

(2) The order approving conversion will require the post-conversion permit holder, on or before the 90th day after the date of the order, to submit to the department a notarized statement attesting that the annuities have been issued and funded on behalf of the purchasers listed in the pro forma post-conversion summary included in the conversion application and disclosing the date that the notification letters included in the conversion application were mailed to the purchasers.

(3) The order approving conversion will require the post-conversion permit holder, on or before the 90th day after the date the trust funds are transferred as authorized by the order, to submit to the department a final post-conversion summary pertaining to each converted prepaid contract, determined as of the conversion date, with totals for all prepaid contracts, if applicable, addressing each of the following categories:

(A) name of annuitant;

(B) policy number of the annuity issued to the annuitant, or of each annuity if a supplemental annuity is also issued;

(C) contract purchase price;

(D) paid-in principal;

(E) unpaid principal balance, if any;

(F) the amount of transferred trust funds applied to the premium for each annuity;

(G) amount retained by the applicant under Finance Code, §154.252;

(H) cash surrender value of each annuity, assuming the annuity were to be surrendered on the conversion date; and

(I) death benefit under each annuity, assuming death were to occur on the conversion date.

(4) The order approving conversion will require that each prepaid contract for which the certified mail notification letter is returned unclaimed to remain subject to the trust-funded funeral benefit arrangement. Such prepaid contract may not be converted to the insurance-funded funeral benefit arrangement approved in the order unless the applicant can demonstrate to the department that the purchaser has received notice of the proposed conversion and the purchaser's right to decline the conversion, as required by Finance Code, §154.204.

(5) The order approving conversion will require the conversion transaction to be fully implemented and completed on or before the 150th day after the date of the conversion order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706382
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: April 18, 2008
For further information, please call: (512) 475-1300

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER B. INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §84.209

The Finance Commission of Texas (commission) proposes amendments to 7 TAC §84.209, concerning Model Clauses for motor vehicle installment sales contracts.

The purpose of the amendments to 7 TAC §84.209 is to implement recent legislation enacted by the 80th Texas Legislature regarding fees for motor vehicle installment sales contracts. The changes implement House Bill 310 concerning a plate transfer fee and Senate Bill 11 (SB 11) concerning a compliance fee.

House Bill 310 amends Texas Transportation Code, §502.453 by adding a $5.00 charge to the cost for transferring license plates and receiving new registration insignia. The agency believes that Texas Finance Code, Chapter 348 supports the inclusion of the plate transfer fee, at the dealer's option, as an itemized charge.

Thus, the purpose of the proposed addition of §84.209(8)(C) concerning the plate transfer fee under Texas Transportation Code, §502.453, is to provide dealers with the option of charging under the itemization of amount financed an optional $5.00 fee for transferring license plates and receiving new registration insignia.

Senate Bill 11, among other things, amends Texas Transportation Code, §503.0631(f) by allowing a motor vehicle dealer to charge a fee designed to compensate the dealer for complying with the temporary tag database. The compliance fee added by SB 11 does not fall under any category of the exclusive list contained in Texas Finance Code, §348.005 of the only allowable itemized charges that a dealer can include in a retail installment contract. Under Texas Finance Code, §348.005(1), the compliance fee is not a fee "for registration, certificate of title, or license", and is not an "additional registration fee charged by a full service deputy." The compliance fee is not a tax under Texas Finance Code, §348.005(2). Under Texas Finance Code, §348.005(4), the compliance fee is also not a "charge authorized for insurance, service contracts, or warranties by Subchapter C." Texas Finance Code, §348.005(3) allows only for "fees or charges prescribed by law and connected with the sale or inspection of the motor vehicle . . . ." Texas courts have distinguished between "prescribed" and "permitted," holding that "prescribed" is a much more restrictive term indicating mandatory le-

gal standards. *Jones v. Killingsworth*, 403 S.W. 325 (Tex. 1965). As the compliance fee is a fee that the dealer "may charge" according to SB 11, it is permissive and not required by the state for the sale or inspection of a motor vehicle. Therefore, the commission believes that the permissive compliance fee is not authorized in a retail installment contract subject to Texas Finance Code, Chapter 348 as an itemized charge under §348.005.

Consequently, the purpose of the proposed addition of §84.209(8)(D) concerning the compliance fee under Texas Transportation Code, §503.0631(f), is to clearly state that the creditor is prohibited from assessing an itemized charge under the itemization of amount financed for costs associated with complying with the temporary tag database.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

For each year of the first five years the amendments are in effect, Commissioner Pettijohn has also determined that the public benefit anticipated as a result of the proposed amendments will be that the commission's rules will reflect recent legislation and will be more easily understood.

It is anticipated that there may be some minimal costs to persons who are required to comply with the amendments as proposed. These minimal costs would involve potential training and modification that may be necessary related to the licensee's software programming in order to implement the proposed amendments. It is the agency's understanding that the itemization of the plate transfer fee may easily be accomplished with a simple programming change within a licensee's computerized form. Thus, it is the agency's estimation that such training and programming costs would be no more than $200 per licensee. There will be no adverse economic effect on small or micro businesses.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register*. At the conclusion of the 31st day after the proposed amendments are published in the Texas Register, no further written comments will be considered or accepted by the commission.

The amendments are proposed under Texas Finance Code §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the proposed amendments are contained in Texas Finance Code, Chapter 348.

§84.209. Model Clauses.

The following model clauses provide the plain language equivalent of provisions found in contracts subject to Texas Finance Code, Chapter 348.

(1) - (7) (No change.)

(8) Itemization of amount financed. The creditor drafting the contract is given considerable flexibility regarding the itemization of amount financed disclosure so long as the itemization of amount financed disclosure complies with the Truth in Lending Act. As an example, a creditor may disclose the manufacturer's rebate either as: a component of the downpayment; or a deduction from the cash price of the motor vehicle. The model contract provision for the itemization of the amount financed discloses the manufacturer's rebate as a component of the downpayment. If the creditor elected to disclose the manufacturer's rebate as a deduction from the cash price of the motor vehicle, the cash price component of the itemization of amount financed would be amended to reflect the dollar amount of the manufacturer's rebate being deducted from the cash price of the motor vehicle.

(A) - (B) (No change.)

(C) Optional plate transfer fee. Under Texas Transportation Code, §502.453, the creditor may charge under the itemization of amount financed an optional $5.00 fee for transferring license plates and receiving new registration insignia.

(D) Compliance fee prohibited. Under Texas Transportation Code, §503.0631(f), the creditor is prohibited from assessing an itemized charge under the itemization of amount financed for costs associated with complying with the temporary tag database.

(9) - (43) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706391
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 936-7611

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CHAPTER 89. PROPERTY TAX LENDERS
SUBCHAPTER F. COSTS AND FEES

7 TAC §89.602, §89.603

The Finance Commission of Texas (commission) proposes new 7 TAC §89.602, concerning Fee for Filing Release, and §89.603, concerning Fee for Payoff Statement or for Information on Current Balance Owed, regarding property tax lenders. The agency plans to consider a proposed rule regarding attorney's fees for a future meeting of the commission.

As a note of background regarding these rules, the property tax lender industry is a fairly young industry (approximately 10-12 years old) and an industry newly regulated by the agency. The agency decided that it would be in the best interest of consumers as well as the industry to gather information from interested stakeholders in order to prepare an informed and well-balanced proposal for the commission on the issue of fees. Accordingly, the agency distributed an Advance Notice of Proposed Rulemaking (ANPR) and received written comments from several interested stakeholders. Subsequently, the agency held a stakeholders meeting where several stakeholders provided ver-

bal testimony and elaborated on their written comments to the ANPR.

Upon review of all the thorough and insightful commentary provided, the agency also distributed a proposed rule draft to the growing list of stakeholders for specific early or pre-comment prior to the presentation of the rules to commission. The agency believes that this early participation of stakeholders in the rule-making process has greatly benefited the resulting proposal.

The agency carefully evaluated the stakeholders' comments and has incorporated numerous recommendations offered by the stakeholders. Some suggestions, however, are not included in the agency's proposal. During the official comment period, stakeholders are welcome to resubmit any comments regarding issues not incorporated into the proposal.

In general, the purpose of the new rules is to establish for property tax lenders post-closing fees as required under Senate Bill 1520 (SB 1520), as enacted by the 80th Texas Legislature. The individual purposes of each rule are provided below.

Section 89.602 provides the fees that may be charged by a property tax lender when filing a release of lien. Subsection (a) outlines the allowable fee components, which include the actual costs charged by the county clerk for filing the release, the actual costs of an outside attorney for preparing the release, and an administrative fee not to exceed $25 for services related to filing provided by the property tax lender.

Subsection (b) of §89.602 states that the administrative fee contained in §89.602(a)(3) may be limited by other law, in order to provide notice to property tax lenders that this fee should be reviewed in conjunction with other state or federal laws applicable to the particular transaction.

Section 89.602(c) provides for a maximum aggregate fee of $75 that may be charged by a property tax lender for filing a release. The agency believes that this maximum fee can accommodate the filing fees of Texas county clerks (e.g., fees for filing a release in Travis or Williamson county range from $16 to $21), a reasonable attorney's fee for preparing a simple release form, and up to $25 for the mailing, delivery, and other related filing costs of the property tax lender.

Section 89.603 describes the fees that a property tax lender may charge in conjunction with providing a payoff statement or information regarding the current balance owed by the property owner. The statutory prohibition on charging a fee for the initial payoff statement is echoed in subsection (a).

In §89.603(b), a $10 fee is prescribed for each additional payoff statement provided by a property tax lender after an initial payoff statement has been provided. The $10 amount is modeled after the payoff statement directive issued by the Department of Housing and Urban Development (*Housing and Urban Development Handbook* 4330.1 REV-5, Ch. 4, Directive No.: 4330.1, "Administration of Insured Home Loans").

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of the new rules will be consistency and clarity in the fees charged for post-closing costs, benefiting both lenders and consumers alike. An additional public benefit of the proposed rules is enhanced compliance with the credit laws.

Additional economic costs may be incurred by a person required to comply with this proposal. The anticipated costs related to the fee limitations are not predictable, as the current practice in the property tax lender industry includes a wide range of fees. The variance for post-closing cost fees is both above and below the fee maximums proposed within this rule. Thus, some lenders will have to reduce their fees in order to comply and other lenders will be able to continue charging the same amount as their fees are less than the fees permitted by the proposal. Obviously, the lender whose current fees are greater than the fees proposed would incur the difference between the fees as proposed and the lender's current fees as a cost to continue engaging in a property tax loan that is secured by real property designed for single-family use.

The agency is not aware of any adverse economic effect on small businesses resulting from this proposal. But in order to obtain more complete information concerning the economic effect of these new rules, the agency invites comments from interested stakeholders and the public on any economic impacts on small businesses, as well as any alternative methods of achieving the purpose of these proposed rules while minimizing adverse impacts on small businesses.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed new rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed new rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

These new sections are proposed under Texas Tax Code, §32.06(a-4), which authorize the Finance Commission to adopt rules to establish reasonable fees for property tax lenders.

The statutory provisions affected by the proposed new sections are contained in Texas Tax Code, §32.06 and §32.065, and Texas Finance Code, Chapter 351, Property Tax Lenders, known as the "Property Tax Lender License Act" (Acts 2007, 80th Legislature, chapter 1220, effective September 1, 2007).

§89.602. Fee for Filing Release.

(a) Allowable fee components. Under Texas Tax Code, §32.06(b), a property tax lender may charge a property owner the following for filing the release:

(1) the actual cost charged by the county clerk for filing the release;

(2) the actual cost of attorney's fees paid to an outside attorney who is not an employee of the property tax lender for preparing the release; and

(3) an administrative fee not to exceed $25 for services related to filing provided by the property tax lender (e.g., costs to mail or deliver release to county clerk or taxing unit(s)).

(b) Potential limitations on administrative fee. The administrative fee provided by subsection (a)(3) of this section may be limited by other law.

(c) Maximum aggregate fee. The maximum aggregate fee for all of the items provided in subsection (a) of this section shall not exceed $75.

§89.603. Fee for Payoff Statement or for Information on Current Balance Owed.

(a) Initial payoff statement. Under Texas Tax Code, §32.06(f-3), a property tax lender is prohibited from charging any fee for providing an initial payoff statement.

(b) Additional payoff statements. A property tax lender may charge a fee not to exceed $10 for providing each additional payoff statement after an initial payoff statement has been provided.

(c) Fee for information on current balance owed. Under Texas Tax Code, §32.06(g), a property tax lender may charge the same fees contained in subsection (b) of this section for responding to a request for the current balance owed by the property owner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706392
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 936-7611

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TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM
SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §§255.9, 255.11 - 255.13, 255.17

The Office of Rural Community Affairs (Office) proposes amendments to §§255.9, 255.11 - 255.13, and new §255.17 for the Community Development Block Grant (CDBG) non-entitlement area funds.

The amendments are being proposed to specify criteria contained within the 2008 Action Plan.

Charles S. (Charlie) Stone, Executive Director of the Office, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections as proposed.

Mr. Stone has also determined that for each year of the first five-year period the sections are in effect the public benefit as a result of enforcing the sections will be the equitable allocation of CDBG non-entitlement are funds to eligible units of general local government in Texas. There will be no cost to small business or individuals.

Comments on the proposal may be submitted to Mark Wyatt, Director of Community Development, Office of Rural Community Affairs, P.O. Box 12877, Austin, Texas 78711, telephone: (512) 936-6701. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register.*

The amendments and new section are proposed under §487.052 of the Government Code, which provides the executive committee with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed sections.

§255.9. Colonia Fund.

(a) General provisions. This fund covers the payment of assessments, access fees, and capital recovery fees for low and moderate income persons for eligible water and sewer improvements projects, all other program eligible activities, eligible planning activities projects, and the establishment of colonia self-help centers to serve severely distressed unincorporated areas of counties which meet the definition of a colonia under this fund. A colonia is defined as: any identifiable unincorporated community that is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and was in existence as a colonia prior to the Cranston-Gonzalez National Affordable Housing Act (November 28, 1990) [~~November 28, 1990~~]. For an eligible county to submit an application on behalf of eligible colonia areas, the colonia areas must be within 150 miles of the Texas-Mexico border region, except that any county that is part of a standard metropolitan statistical area with a population exceeding one million is not eligible under this fund.

(1) - (4) (No change.)

(b) - (e) (No change.)

(f) Selection criteria (colonia construction fund). The following is an outline of the selection criteria used by the Office for scoring colonia construction fund applications. For the 2007 and 2008 program years, four hundred thirty points are available.

(1) - (5) (No change.)

(6) Project design scoring guidelines. Project design scores are assigned by Office staff using guidelines that first consider the severity of the need for each application activity and how the project resolves the need described in the application. The severity of need and resolution of the need determine the maximum project design score that can be assigned to an application. After the maximum project design score has been established, points are then deducted from this maximum score through the evaluation of the other project design evaluation factors until the maximum score and the point deductions from that maximum score determine the final assigned project design score. When necessary, a weighted average is used to set the maximum project design score to applications that include activities in the different severity of the need/project resolution maximum scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity is calculated. The percentage of the total TxCDBG construction dollars for each activity is then multiplied by the appropriate maximum project design point level. The sum of the calculations determines the maximum project design score that the applicant can be assigned before points are deducted based on the evaluation of the other project design factors.

(A) (No change.)

(B) TxCDBG cost per low to moderate income beneficiary. The total amount of TxCDBG funds requested by the applicant is divided by the total number of low to moderate income persons benefiting from the application activities to determine the TxCDBG cost per beneficiary.

(i) - (v) (No change.)

(vi) Cost per low to moderate income beneficiary is greater than $10,000 but equal to or less than $11,000. Deduct 5 points from the set maximum project design score.

(vii) Cost per low to moderate income beneficiary is greater than $11,000 but equal to or less than $13,000. Deduct 10 points from the set maximum project design score.

(viii) Cost per low to moderate income beneficiary is greater than $13,000 but equal to or less than $15,000. Deduct 15 points from the set maximum project design score.

(ix) Cost per low to moderate income beneficiary is greater than $15,000 but equal to or less than $17,000. Deduct 20 points from the set maximum project design score.

(x) Cost per low to moderate income beneficiary is greater than $17,000 but equal to or less than $19,000. Deduct 30 points from the set maximum project design score.

(xi) Cost per low to moderate income beneficiary is greater than $19,000. Deduct 40 points from the set maximum project design score.

(C) - (J) (No change.)

(7) (No change.)

(g) - (j) (No change.)

§255.11. Small Towns Environment Program Fund.

(a) (No change.)

(b) Eligible activities. For the small towns environment program fund eligible activities are limited to the following:

(1) - (9) (No change.)

(10) Rental of equipment [~~Equipment~~] for installation of water or sewer [~~if justification is provided~~].

(11) - (12) (No change.)

(c) (No change.)

(d) Funding cycle. Applications are accepted two [~~three~~] times a year as long as funds are available. Funds will be divided among the two [~~three~~] application periods. After all projects are ranked, only those that can be fully funded will be awarded a grant. There will be no marginally funded grant awards. The TxCDBG will not accept an application for STEP fund assistance until TxCDBG staff and representatives of the potential applicant have evaluated the self-help process and TxCDBG staff determine that self-help is a feasible method for completion of the water or sewer project, the community is committed to self-help as the means to address the problem, and the community is ready and has the capacity to begin and complete a self-help project. If it is determined that the community meets all of the STEP criteria then an invitation to apply for funds will be extended to the community and the application may be submitted.

(e) Threshold criteria. The self-help response to water and sewer needs may not be appropriate in every community. In most cases, the decision by a community to utilize self-help to obtain needed water and sewer facilities is based on the community's realization that it cannot afford even a "no frills" water or sewer system based on the initial construction costs and the operations/maintenance costs (including debt service costs) for water or sewer facilities installed through conventional financing and construction methods. The following are threshold requirements for the STEP framework: Without all these elements the project may not be considered under the STEP fund.

(1) - (3) (No change.)

(4) The community receiving benefits from the project must be able to show that by completing the proposed project through self-help volunteer methods the community can achieve at least a 40% savings off the retail price of completing the same project through the bid/contract process. The 40% savings and requirement that the project must be performed predominately by community volunteer workers is determined for each water or sewer activity with its own distinct beneficiaries. The information provided to the TxCDBG to document the reduced project cost through self-help includes the following:

(A) - (D) (No change.)

(5) (No change.)

(f) (No change.)

(g) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring applications under the STEP fund. One hundred twenty (120) points are available. A project must score at least 75 points overall and 15 points under the factor in paragraph (2) of this subsection to be considered for funding.

(1) Project impact (total--up to 60 points). When necessary, a weighted average is used to assign scores to applications which include activities in the different project impact scoring levels. Using as a base figure the TxCDBG funds requested minus the TxCDBG funds requested for engineering and administration, a percentage of the total TxCDBG construction dollars for each activity will be calculated. The percentage of the total TxCDBG construction dollars for each activity will then be multiplied by the appropriate project impact point level. The sum of these calculations will determine the composite project impact score. Factors that are evaluated by the TxCDBG staff in the assignment of scores within the predetermined scoring ranges for activities include, but are not limited to, how the proposed project will resolve the identified need and the severity of the need within the applying jurisdiction; and projects designed to bring existing services up to at least the state minimum standards as set by the applicable regulatory agency are generally given additional consideration. The different project impact scoring levels and scoring ranges within each level are:

(A) first time water and/or sewer service--up to 60--40 [~~50~~] points

(B) water activities addressing drought conditions--up to 60--40 [~~50~~] points

(C) activities addressing severe impact to a water system (imminent loss of well, transmission line, supply impact)--up to 60--40 [~~50~~] points

(D) water and/or sewer activities addressing an imminent threat to health as documented by the Texas Commission of Environmental Quality or Texas Department of State Health Services--60--40 [~~50~~] points

(E) Problems due to severe sewer issues that can be addressed through the STEP process (documented)--up to 60--40 points

(F) [~~(E)~~] activities addressing documented severe water pressure problems--up to 50--40 points

(G) [~~(F)~~] replacement of existing water or sewer lines that are not addressing activities described in subparagraphs (A) - (F) [~~(E)~~] of this paragraph--up to 40--30 points

(H) [~~(G)~~] all other proposed water and sewer projects that are not addressing activities described in subparagraphs (A) - (G) [~~(F)~~] of this paragraph--up to 30--20 points

(2) - (5) (No change.)

§255.12. Microenterprise Fund.

(a) General provisions. This fund is available on a semi-annual [~~an annual~~] basis for funding from available program income through a [~~an annual~~] statewide competition. [~~Applications received by the application deadline are eligible to receive grant awards from available program income.~~] An eligible community submits the application and must contract with a non-profit organization (economic development corporation, community development corporation, etc.) for the purpose of establishing a local loan program that directly assists for-profit microenterprise businesses. Proceeds from the repayment of the loans will be retained by the non-profit organization.

(b) - (c) (No change.)

(d) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring microenterprise fund applications. One hundred twenty (120) points are available. Additional information on the selection criteria may be provided in the application guide.

(1) Community Distress (total--50 points). All community distress factor scores are based on the population of the applicant. For counties, the population may include the unincorporated county population and the populations of any cities located in the county participating in the application. For Percentage of Person Living in Poverty, Population Loss, and Unemployment Rate factors: An applicant that has 150% or greater than the state median will receive the maximum points available for that factor, an applicant that has less than or equal to 150% but not less than 75% of the state median will receive one half of the maximum points available for that factor, and an applicant that has less than 75% of state median will receive a quarter of the maximum points available for that factor. For the per capita income factor: An applicant that has 75% or less of the state median will receive the maximum number of points available for that factor, an applicant that has greater than or equal to 75% but less than 150% of the state median will receive one half of the maximum points available for that factor, and an applicant that has greater than or equal to 150% of the state median will receive a quarter of the maximum points available for that factor. [~~An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.~~]

(A) - (D) (No change.)

(2) - (5) (No change.)

(6) An application must receive at least 50 points overall and 25 points under Program Design to be considered eligible for funding consideration.

§255.13. Small Business Fund.

(a) General provisions. This fund is available on "as-needed" [~~an annual~~] basis for funding from available program income through a [~~an annual~~] statewide competition. Applications received by the application deadline are eligible to receive grant awards from available program income. An eligible community submits the application for the purpose of supporting for-profit small businesses through a loan [~~loans~~] meeting a gap financing need. Retention of the proceeds from the repayment of the loans will meet the same requirements for program income that apply to Texas Capital Fund contracts.

(b) - (c) (No change.)

(d) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring small business fund applications. One hundred twenty five (125) points are available. Additional information on the selection criteria may be provided in the application guide.

(1) Community Distress (total--up to 50 points). All community distress factor scores are based on the population of the applicant. For counties, the population may include the unincorporated county population and the populations of any cities located in the county participating in the application. For Percentage of Person Living in Poverty, Population Loss, and Unemployment Rate factors: An applicant that has 150% or greater than the state median will receive the maximum points available for that factor, an applicant that has less than or equal to 150% but not less than 75% of the state median will receive one half of the maximum points available for that factor, and an applicant that has less than 75% of state median will receive a quarter of the maximum points available for that factor. For the per capita income factor: An applicant that has 75% or less of the state median will receive the maximum number of points available for that factor, an applicant that has greater than or equal to 75% but less than 150% of the state median will receive one half of the maximum points available for that factor, and an applicant that has greater than or equal to 150% of the state median will receive a quarter of the maximum points available for that factor. [~~An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.~~]

(A) - (D) (No change.)

(2) - (7) (No change.)

(8) An application must receive at least 50 points overall and 15 points under Project Feasibility to be considered for funding.

§255.17. Renewable Energy Demonstration Pilot Program.

(a) General provisions. The TxCDBG will develop a renewable energy pilot program funded solely through deobligated funds/program income for demonstration projects that employ renewable energy for at least 20% of the total energy requirements (excluding the purchase of energy from the electric grid that was produced with renewable energy). The priority will be for projects that are connected with providing public facilities to meet basic human needs such as water or waste water. It is anticipated that the projects

funded would meet the National Objective of benefiting a "target area" where at least 51% of the residents are low and moderate income persons, although the project would be allowed to qualify under other National Objective alternatives. The maximum amount of the project would be $500,000 and the minimum would be $50,000.

(b) Selection criteria. The projects will be selected on the following basis. Seventy points are available.

(1) Type of Project: Primarily used in conjunction with providing public facilities to meet basic human needs such as water or waste water and/or benefit to low/moderate-income persons--up to 15 points.

(2) Innovative Technology/Methods--A project that would demonstrate the application of innovative technology and/or methods--up to 10 points.

(3) Duplication in Other Rural Areas--A project that could have widespread application (although it would not need to be applicable in every portion of the state)--up to 10 points.

(4) Long-term Cost/Benefit and Texas Renewable Energy Goals--Projects that demonstrate long term cost/benefit analysis including benefits to the human environment and consistency with Texas renewable energy goals--up to 10 points.

(5) Partnership/Collaboration--Projects that have a demonstrated partnership and collaboration with other entities focusing on promoting renewable energy including universities, funding agencies, associations, or businesses--up to 10 points.

(6) Leveraging--projects with committed funds from other entities including funding agencies, local governments, or businesses--Percent of portion of total project receiving TxCDBG funds is leveraged with other funds--50%--10 points, 25%--5 points, 10%--3 points, 5%--1 point.

(7) Location in Rural Areas--Projects that benefit cites with populations under 10,000 and/or counties under 100,000--5 points.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706281
Charles S. (Charlie) Stone
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 936-7887

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TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER N. SUSPENSION AND REVOCATION OF LICENSURE

22 TAC §535.141

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.141 concerning Initiation of Investigation.

The amendments to 22 TAC §535.141(a) and (b) are proposed to comply with new legislation that amended Texas Occupations Code Chapters 1101 and 1102 enacted during the 80th Legislative Session, Regular Session, by Senate Bill 914. Senate Bill 914 in part amends Texas Occupations Code §1101.204 to authorize commission staff to file complaints and conduct investigations as necessary to enforce Chapter 1101 and Chapter 1102. The proposed amendment to 22 TAC §535.141(a) clarifies that the section applies to all persons licensed or registered by the Texas Real Estate Commission, including persons licensed under Chapter 1102. The proposed amendment to §535.141(b) deletes references which are redundant or conflict with the recent amendments to §1101.204.

The new text in 22 TAC §535.141(b) is proposed to comply with new legislation that included amendments to Texas Government Code §402.031 enacted during the 80th Legislative Session, Regular Session, by House Bill 716 relating to mortgage fraud. The proposed amendments to 22 TAC §535.141(b) recognize that while Texas Occupations Code §1101.204(e) does not permit staff to conduct covert investigations except as authorized by the commission, such investigations may be conducted if they relate to a report of fraudulent activity as defined in §402.031. Similarly, the proposed amendments reflect that while Texas Occupations Code §1101.204(d) requires TREC to provide notice to a licensee who is the subject of an investigation, new Texas Government Code §402.031 requires TREC to withhold such information from the subject of the report if it is a report of fraudulent activity as defined in §402.031.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated economic effect on small businesses, micro-businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with new statutory requirements. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments to the rule are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by the proposed amendments are Texas Occupations Code, Chapters 1101 and 1102, and Texas Government Code, Chapter 402. No other statute, code or article is affected by the proposed amendments.

§535.141. Initiation of Investigation.

(a) As used in this section, the term "licensee" includes a person licensed or registered under Texas Occupations Code Chapters

1101 and 1102 [~~as an easement or right-of-way agent~~] and the term "license" includes a registration issued by the commission.

(b) Except as authorized under Texas Government Code §402.031(b), the commission may not conduct an undercover or covert investigation of a person licensed under Texas Occupations Code Chapters 1101 or 1102. Notwithstanding §1101.204(d), the commission shall not disclose to any person who is the subject of an investigation of fraudulent activity that the activity has been reported pursuant to §402.031.

~~[(b) If the Texas Real Estate Commission (the commission) receives a complaint, and such complaint on its face alleges a possible violation of the Real Estate License Act, Texas Occupations Code, Chapter 1101, (the Act), the commission shall investigate the complaint. The commission, on its own motion, with reasonable cause, may initiate an investigation of the actions and records of a licensee.]~~

(c) - (j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2007.

TRD-200706352
Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 465-3900

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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES
SUBCHAPTER E. CONTESTED CASES

22 TAC §661.99

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.99, concerning the Sanctions and Penalty Matrix. The new citations inserted into the Sanctions and Penalty Matrix will incorporate new sanctions for rules that were recently adopted. There will also be one citation removed because the rule cited was recently repealed and is included in another rule.

The additions to the Sanctions and Penalty Matrix will clarify sanctions for §661.55 regarding Surveying Firms Registration, §661.57 regarding Surveying Firms Compliance and §661.60 regarding Responsibility to the Board. Section 661.121 was removed from the Matrix because the rule was repealed and now incorporated in §661.55(f).

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the Sanctions and Penalty Matrix as it relates to currently adopted rules.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, TX 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed pursuant to Section 1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, General Rules of Procedures and Practices.

§661.99. Sanctions and Penalty Matrix.

The Board, the Executive Director, Investigator, Administrative Law Judge or the participants in an Informal Conference may arrive at a greater or lesser sanction and penalty than suggested in this Rule. The minimum administrative penalty is $100 per violation. The maximum administrative penalty shall be $1500 per violation. In addition to the sanctions and penalties noted below, the Board may order restitution, suspension, probation and/or additional educational courses. Allegations and disciplinary actions will be set forth in the final Board Order and the severity of the disciplinary action will be based on the following factors:

(1) the seriousness of the violation, including the nature, circumstances, extent and gravity of any prohibited acts;

(2) the economic damage to property caused by the violation;

(3) the history of previous violations;

(4) the amount necessary to deter a future violation;

(5) efforts to correct the violation; and

(6) any other matter that justice may require.

Figure: 22 TAC §661.99(6)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706338
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 239-5263

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CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.19

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §663.19, concerning Plat/Description/Report. This section identifies what the registered land surveyor is required to include in surveying reports.

The amendment will further clarify the information that a land surveyor must include when furnishing plats, description or reports in regards to a survey that he has completed.

Sandy Smith, Executive Director, has determined that for the first five year period the rule is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the rule is in effect the public will benefit from the rule because it will clarify the information that is provided.

There will be no effect on small or micro businesses that are in compliance with the Board's Act and Rules. There are no anticipated costs to those who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 12100 Park 35 Circle, Building A, Suite 156, Austin, TX 78753. Comments may also be faxed to Ms. Smith at the Board at (512) 239-5253 or may be sent electronically to ssmith@txls.state.tx.us. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, General Rules of Procedures and Practices.

§663.19. Plat/Description/Report

For the purposes of these rules the word "report" shall mean any or all of the following survey plat, descriptions, or separate narratives.

(1) - (9) (No change.)

(10) If a surveyor provides a written narrative in lieu of a Plat/sketch/drawing to report the results of a survey, the written narrative shall contain sufficient information to demonstrate the survey was conducted in compliance with the Act and rules of the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706339
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 239-5263

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS SUBCHAPTER B. ORGANIZATION

22 TAC §850.63

The Texas Board of Professional Geoscientists (TBPG or Board) proposes an amendment to 22 TAC §850.63, concerning the responsibilities of the Board and Executive Director. This section establishes guidelines requiring license holders to provide notification to the consumer for the purpose of directing complaints to the Board. This amendment clarifies how the notification will be provided to the consumer.

Vincent Houston, Acting Executive Director of TBPG, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Houston has also determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amended section will be enhancement of the professional practice of geoscientists by clarifying how consumers are notified for the purpose of directing complaints to the Board. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Comments on this proposal may be submitted in writing to: Molly B. Roman, Administrative Coordinator, P.O. Box 13225, Austin, Texas 78711, (512) 936-4405. Comments may also be submitted electronically to mroman@tbpg.state.tx.us or faxed to (512) 936-4409. Comments must be submitted no later than 30 days from the date the proposed amendments are posted in the *Texas Register*. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by Ms. Roman no more than 15 calendar days after notice of proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Occupations Code, §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties. It also corresponds with §1002.202, regarding the filing of complaints.

The proposed amendment implements the Texas Occupations Code, §1002.151 and §1002.202.

§850.63. Responsibilities of the Board and Executive Director.

(a) - (g) (No change.)

(h) The Board shall require license holders to notify consumers and service recipients of the name, mailing address, and telephone numbers of the Board for purposes of directing complaints to the Board. The notification shall be included on:

(1) the written contract for services of an individual or entity regulated by the Board;

(2) a sign prominently displayed in the place of business of each individual or entity regulated by the Board if the consumers or service recipients must visit the place of business for said service or products.[; and]

[(3) a bill for service provided by an individual or entity regulated by the Board.]

(i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706337
Vincent Houston
Acting Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 936-4405

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.70

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Insurance proposes the repeal of §7.70, concerning the 2000 annual statements, other reporting forms, and diskettes or electronic filings with the National Association of Insurance Commissioners (NAIC) via the internet. The section is proposed for repeal because the Department is proposing a new §7.70 concerning the 2007 annual and quarterly statement blanks, the 2008 quarterly statement blanks, other reporting forms, electronic data filings with the NAIC via the internet and instructions to be used by insurers and certain other regulated entities authorized to do the business of insurance in this state when reporting their 2007 and part of their 2008 calendar year financial condition and business operations and activities. The proposed new §7.70 is also published in this issue of the *Texas Register.*

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the repeal of the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal, and there will be no effect on local employment or local economy as result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that, for each year of the first five years the repeal of the section will be in effect, the public benefit anticipated as a result of the repeal will be the elimination of obsolete regulations. There will be no economic cost to any individuals, or insurers or other Department regulated entities, regardless of size, as a result of the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that this proposed repeal will not have an adverse economic effect on small or micro business carriers because it is simply a repeal of an unnecessary rule. Therefore, in accordance with the Government Code §2006.002(c), the Department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 28, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, oral and written comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of the section is proposed under the Insurance Code §§802.001 - 802.003, 802.051 - 802.056, and 36.001. Sections 802.001 - 802.003 and 802.051 - 802.056 authorize the Commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true exhibit of their condition and methods of transacting business. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes in the Insurance Code will be affected by this proposed repeal: Chapters 2201, 2210, and 2211 and §§32.041, 421.001, 802.001 - 802.003, 802.051 - 802.056, 841.255, 842.003, 842.201, 842.202, 843.151, 843.155, 844.001 - 844.005, 844.051 - 844.054, 844.101, 861.254, 861.255, 862.001, 862.003, 882.001, 882.003, 883.002, 883.204, 884.256, 885.401, 885.403-885.406, 886.107, 887.009, 887.060,

887.401 - 887.407, 911.001, 911.304, 912.002, 912.201 - 912.203, 912.301, 941.252, 942.201, 961.002, 961.003, 961.052, 961.202, 982.001, 982.002, 982.004, 982.052, 982.101, 982.102, 982.103, 982.104, 982.106, 982.108, 982.110 - 982.112, 982.251 - 982.255, 982.302 - 982.306, 984.153, 984.201, 984.202, 1301.009, 1506.057, 2551.001, and 2551.152.

§7.70. Requirements for Filing the 2000 Annual Statements, Other Reporting Forms, and Diskettes or Electronic Filings with the NAIC via the Internet.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 17, 2007.

TRD-200706398

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Earliest possible date of adoption: January 27, 2008

For further information, please call: (512) 463-6327

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28 TAC §7.70

The Texas Department of Insurance proposes new §7.70, concerning the adoption by reference of reporting forms, electronic data filings with the National Association of Insurance Commissioners (NAIC) and instructions to be used by insurers, health maintenance organizations (HMOs), nonprofit legal service corporations, Texas Health Insurance Risk Pool, Texas Fair Plan Association and Texas Windstorm Insurance Association. The reporting forms include the 2007 quarterly and the 2007 annual statement blanks, the 2008 quarterly statement blanks, Schedule SIS, management discussion and analysis, supplemental compensation exhibit, overhead assessment exemption form for insurance company examination expenses, analysis of surplus, separate accounts, supplemental information for county mutuals and HMOs, release of contributions, reserve summary, inventory of insurance in force, and summary of insurance in force. The insurers and other regulated entities will use these forms to report their 2007 and part of their 2008 calendar year financial condition and business operations and activities. The information provided by the completion of the forms is necessary to allow the Department to monitor the solvency, business activities, and statutory compliance of the insurers and the other entities regulated by the Department. The proposed new section adopts by reference the NAIC 2007 annual and quarterly statement blanks, the NAIC 2008 quarterly statement blanks, related instructions, and other reporting forms and instructions for reporting the financial condition, business operations and activities of insurance companies and other entities regulated by the Department. The proposed new section also requires insurance companies and other entities regulated by the Department to file such annual and quarterly statements and other reporting forms with the Department and/or the NAIC as directed. The proposed new section also defines terms relevant to the statement blanks and reporting forms and provides the dates by which certain reports are to be filed. Proposed subsection (a) explains the purpose of the section and adopts by reference the forms described in the section. Proposed subsection (b) provides that the term "Texas Edition" refers to the blanks and forms promulgated by the Commissioner. Proposed subsection (c) specifies the hierarchy of laws in the event of a conflict between the Insurance Code, this new section, and other Department regulations and the NAIC instructions specified in the new section. Proposed subsections (d) - (l) describe the forms, instructions and filing requirements for the various types of insurers and other regulated entities. Proposed subsection (m) provides that the Department may request financial reports other than those specified in this section. The forms and instructions are available for inspection in the office of the Financial Analysis and Examination Division of the Texas Department of Insurance, William P. Hobby Jr. State Office Building, 333 Guadalupe, Tower Number III, Third Floor, Austin, Texas. The NAIC forms and instructions may also be reviewed at www.naic.org. The new section will replace the existing §7.70, concerning the adoption of the 2000 annual statements, other reporting forms, and diskettes or alternative electronic method of filing, which is proposed for repeal and also published in this issue of the *Texas Register.*

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the proposed section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section. There will be no effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that, for each year of the first five years the proposed section is in effect, the public benefits anticipated as a result of enforcing this section are the ability of the Department to provide financial information to the public and other regulatory bodies as requested, and to monitor the financial condition of insurance companies, health maintenance organizations and other regulated carriers licensed in Texas to better assure financial solvency. The probable economic cost to persons required to comply with the section depends on several factors including the size, type and complexity of the carrier. Each carrier subject to proposed §7.70 is required by statute to provide the Department with various annual reports on its operations. The Insurance Code §802.055 provides that an insurance company shall pay all costs of preparing and furnishing to the NAIC the information required under the Insurance Code §802.052, including any related filing fees. The reports and forms required by this proposal generally request information that is already captured or created by the carrier as necessary to its business operations; therefore, the additional cost involved generally relates to the transfer of that information from the carrier's records to the required report or form. Although not strictly required by the Government Code §2006.002(c), the proposed section contains a number of accommodations that will mitigate the impact of proposed §7.70 for certain carriers that, because of their carrier type, are more likely to be small or micro business carriers. Specifically, proposed §7.70(d) provides a stipulated premium company with one additional month to file its annual statement and an additional month to make certain other related filings. Proposed §7.70(e) and (i) authorize a simplified financial statement form for a farm mutual insurance company that writes less than $6 million in premium and do not require a farm mutual insurance company to pay NAIC filings fees, to acquire software to prepare financial statement filings with the NAIC, or to file quarterly financial statements with the Department if that farm mutual insurance company writes less than $6 million in premium. Proposed §7.70(j) authorizes a simplified financial statement form for a statewide mutual assessment association, a local mutual aid association, a mutual burial association and

an exempt association and does not require a statewide mutual assessment association, local mutual aid association, mutual burial associations or exempt association to pay NAIC filings fees, to acquire software to prepare financial statement filings with the NAIC, or to file quarterly financial statements with the Department. Proposed §7.70(k) does not require a nonprofit legal service corporation to pay NAIC filings fees or to acquire software to prepare financial statement filings with the NAIC. Proposed §7.70(l) does not require a Mexican casualty insurance company to pay NAIC filing fees or acquire software to prepare financial statement filings with the NAIC. It is anticipated that a carrier, regardless of size, will utilize employees who are familiar with the records of the carrier and accounting practices in general. Such individuals are estimated to be compensated from $17 to $50 per hour based on information obtained by the Department. The Department anticipates that larger business carriers, because of the larger size and relatively more complex operations, will take more time to transfer the required information from their records to the financial forms and reports to be adopted by this proposal. The Department also anticipates that large business carriers will often compensate staff at the higher end of the salary range. Therefore, based on the Department's experience, the overall labor costs for large business carriers to transfer the required information from their records to the required financial forms and reports will generally be more than the overall labor costs for small or micro business carriers. The overall costs to transfer the information from a carrier's records also may vary based upon factors such as the type of carrier (e.g., life, accident and health, or property and casualty), the nature of the risks insured, and the type of software used by the carrier. The cost of software used to prepare the financial statements is approximately $2,000 for a single company. The cost of software may be greater or less depending on the amount charged by the vendor and any extra services that are agreed to between the company and the vendor. The fees associated with each company to file electronically with the NAIC database can range from $247, for carriers with the smallest premium volume, to $69,428, for carriers with the largest premium volume with a limit for insurer groups of $201,000. The Insurance Code §802.055 provides that an insurance company shall pay all costs of preparing and furnishing to the NAIC the information required under the Insurance Code §802.052; therefore, any costs to a carrier for preparing and filing the annual statement results from statutory requirements and not as a result of the adoption, enforcement, or administration of this proposal. The cost of compliance as detailed in this Public Benefit/Cost Note portion of this proposal will be relatively more significant for carriers licensed in Texas for less than one year because of the additional time required for carrier staff to become familiar with the requirements of this proposal, initial software acquisitions costs, and the need to implement systems to capture the information required to be reflected in the financial statements filed with the Department and the NAIC. Since the Department has routinely required the preparation and filing of substantially similar financial statements as required by the proposal for many years, most of these costs for carriers licensed for one year or more have already been incurred.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Department has determined that this proposal contains different requirements that must be analyzed in order to determine costs to small and micro business carriers required to comply with this proposal. First, proposed §7.70(a), (d), (e), (f), (g), (h), (i), (j), (k), and (l) require that each carrier provide the Department with financial reports and related information. Second, proposed §7.70(a), (d), (e), (f), (g), and (h) require that each carrier make concurrent filings of their financial statement with the NAIC that results in related filing fees. Third, proposed §7.70(a), (d), (e), (f), (g), and (h) essentially require that each carrier purchase software to prepare its financial statements and make the related filings with the Department and the NAIC. Each carrier is required by statute to provide the Department with various annual reports on its operations. As noted in the Public Benefit/Cost Note portion of the proposal, the Insurance Code §802.055 provides that an insurance company shall pay all costs of preparing and furnishing to the NAIC the information required under the Insurance Code §802.052, including any related filing fees; therefore, any costs to a carrier for preparing and filing the annual statement results from statutory requirements and not as a result of the adoption, enforcement, or administration of this proposal.

Proposed §7.70(a), (d), (e), (f), (g), (h), (i), (j), (k), and (l); Preparation of Financial Statements. As required by the Government Code §2006.002(c), the Department has determined that approximately 75 to 150 of the carriers specified in proposed §7.70(a) are small or micro business carriers that will be required to comply with the requirements in proposed §7.70(d), (e), (f), (g), (h), (i), (j), (k), and (l) to prepare financial statements that reflect the carriers' condition and to file these statements with the Department and the NAIC. These small or micro business carriers will incur routine costs associated with completing the financial statements. Also, as required by the Government Code §2006.002(c), the Department has determined that these routine costs will not have an adverse economic effect on the approximately 75 to 150 small or micro business carriers. These routine costs of compliance will vary between large business carriers and small or micro business carriers based upon the carrier's type and size and other factors, including the character of the carrier's assets, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. The Department's cost analysis and resulting estimated routine costs for carriers in the Public Benefit/Cost Note portion of this proposal are equally applicable to small and micro business carriers. As indicated in the Public Benefit/Cost Note analysis, these routine costs will often be less for small or micro business carriers, primarily because small or micro business carriers will incur less overall labor costs in transferring information from their records to the required financial forms and reports because their smaller size and relatively less complex operations will generally require less time to transfer the information from their records to the financial forms and reports adopted by this proposal. Small or micro business carriers may also incur relatively lower labor costs on a per hour basis because small or micro business carriers will often compensate staff at the lower end of the salary range. Under the Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required to prepare in addition to an economic impact statement a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Because the Department has determined that the routine costs to comply with this proposal, i.e., preparing the financial forms and reports, will not have an adverse economic effect on small or micro business carriers, the Department is not required to consider alternative methods of achieving the purpose of these requirements in the proposed rule. Nevertheless, although not strictly required by the Gov-

ernment Code §2006.002(c), the proposed section contains a number of accommodations that will mitigate the impact of proposed §7.70 for certain carriers that, because of their carrier type, are more likely to be small or micro business carriers. Specifically, proposed §7.70(d) provides a stipulated premium company with one additional month to file its annual statement compared to large business carriers. Proposed §7.70(d) also provides an additional month for a stipulated premium company to make certain other related filings. Proposed §7.70(d) further exempts a stipulated premium company from the requirement that applies to most other life carriers to file quarterly financial statements with the Department if certain conditions are met. Proposed §7.70(e) and (i) authorize a simplified financial statement form for a farm mutual insurance company that writes less than $6 million in premium. Unlike the requirements that apply to all other property and casualty carriers, proposed §7.70(e) and (i) do not require that a farm mutual insurance company file quarterly financial statements with the Department if that farm mutual insurance company writes less than $6 million in premium. Proposed §7.70(j) authorizes a simplified financial statement form for a statewide mutual assessment association, a local mutual aid association, a mutual burial association and an exempt association. Unlike the requirements that apply to other life carriers, proposed §7.70(j) does not require that quarterly financial statements be filed with the Department by a statewide mutual assessment association, local mutual aid association, mutual burial associations or exempt association. The cost of compliance as detailed in this Public Benefit/Cost Note portion of the proposal will be relatively more significant for carriers licensed in Texas for less than one year because of the additional time required for the carrier's staff to become familiar with the requirements of the proposal and the need to implement systems to capture the information required to be reflected in the financial statements filed with the Department and the NAIC. Since the Department has routinely required the preparation and filing of substantially similar financial statements as required by the proposal for many years, most of these costs for carriers licensed for one year or more have already been incurred.

Proposed §7.70(a), (d), (e), (f), (g) and (h); NAIC Filing Fee. As required by the Government Code §2006.002(c), the Department has determined that approximately 50 to 100 of the carriers specified in proposed §7.70(a) are small or micro business carriers that will be required to comply with the requirements in proposed §7.70(d), (e), (f), (g), and (h) to make concurrent financial statement filings with the NAIC. These small or micro business carriers will incur routine costs associated with related filing fees. Also, as required by the Government Code §2006.002(c), the Department has determined that these routine costs will not have an adverse economic effect on the approximately 50 to 100 small or micro business carriers. The Department's cost analysis and resulting estimated costs for carriers to make concurrent financial statement filings with the NAIC in the Public Benefit/Cost Note portion of this proposal are equally applicable to small or micro business carriers. As indicated in the Public Benefit/Cost Note analysis, these costs of compliance will vary between large business carriers and small or micro business carriers based upon the carrier's premium volume. These fees are on a sliding scale basis and will be less for small or micro business carriers that write smaller amounts of premium and greater for large carriers that write larger amounts of premium. These fees can range from $247, for carriers with the smallest premium volume, to progressively greater amounts based for carriers with the largest premium volume. As examples, a carrier with $100,000 in premium will incur a filing fee of $247, a carrier with $6 million in premium will incur a filing fee of $1,444, and a carrier with $4 billion in premium will incur a filing fee of $69,428. In each example, these fees represent approximately .00002 percent of the stated premium amount. Accordingly, these routine costs will be less for small or micro business carriers because of their relatively smaller premium base. Under the Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required to prepare in addition to an economic impact statement a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Because the Department has determined that the routine costs to comply with this proposal, i.e., making concurrent filings with the NAIC, will not have an adverse economic effect on small or micro businesses, the Department is not required to consider alternative methods of achieving the purpose of these requirements in the proposed rule. Moreover, the Insurance Code §802.055 provides that an insurance company shall pay all costs of preparing and furnishing to the NAIC the information required under the Insurance Code §802.052, including any related filing fees. Accordingly, the cost of preparing and filing the annual statement results from statutory requirements and not as a result of the adoption, enforcement, or administration of this proposal. Nevertheless, although not strictly required by the Government Code §2006.002(c), the proposed section contains a number of accommodations that will mitigate the impact of proposed §7.70 for certain carriers that, because of their carrier type, are more likely to be small or micro business carriers. Specifically, proposed §7.70(e) and (i) do not require that a farm mutual insurance company pay these filing fees if that farm mutual insurance company writes less than $6 million in premium. Proposed §7.70(j) does not require that these filing fees be paid by a statewide mutual assessment association, a local mutual aid association, a mutual burial association and an exempt association. Proposed §7.70(k) does not require that a nonprofit legal service corporation pay these filing fees. Proposed §7.70(l) does not require that a Mexican casualty insurance company pay these filing fees.

Proposed §7.70(a), (d), (e), (f), (g) and (h); Software Expenses. As required by the Government Code §2006.002(c), the Department has determined that approximately 50 to 100 of the carriers specified in proposed §7.70(a) are small or micro business carriers that will essentially be required by proposed §7.70(d), (e), (f), (g), and (h) to purchase software to prepare their financial statements and make the related filings with the Department and the NAIC. These small or micro business carriers will incur routine costs associated with purchasing this software. Also, as required by the Government Code §2006.002(c), the Department has determined that these routine costs will not have an adverse economic effect on the approximately 50 to 100 small or micro business carriers. The Department's cost analysis and resulting estimated costs for carriers to purchase this software contained in the Public Benefit/Cost Note portion of this proposal are equally applicable to small or micro business carriers. As indicated in the Public Benefit/Cost Note analysis, these costs of compliance may vary based upon a number of factors. The cost of software to prepare the financial statements is approximately $2,000 for a single company. The cost of software may be greater or less depending on the amount charged by the vendor, the type of software needed and any extra services that are agreed to between the company and the vendor. Under the Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required to prepare in addition to an economic im-

pact statement a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Because the Department has determined that the routine costs to comply with this proposal, i.e., purchase software, will not have an adverse economic effect on small or micro business carriers, the Department is not required to consider alternative methods of achieving the purpose of these requirements in the proposed rule. Moreover, each carrier subject to this proposal is required by statute to provide the Department with various annual reports on its operations, and therefore, the related costs result from statutory requirements and not as a result of the adoption, enforcement, or administration of this proposal. Nevertheless, although not strictly required by the Government Code §2006.002(c), the proposed section contains a number of accommodations that will mitigate the impact of proposed §7.70 for certain carriers that, because of their carrier type, are more likely to be small or micro business carriers. Specifically, proposed §7.70(d) exempts a stipulated premium company from the requirement that applies to most other life carriers to file quarterly interim financial statements with the Department if certain conditions are met, which lessens its software needs. Proposed §7.70(e) and (i) do not require that a farm mutual insurance company acquire this software and the related expense if that farm mutual insurance company writes less than $6 million in premium. Proposed §7.70(j) does not require that this software be acquired and the related expense incurred by a statewide mutual assessment association, a local mutual aid association, a mutual burial association and an exempt association. Proposed §7.70(k) does not require that a nonprofit legal service corporation acquire this software and incur the related expense. Proposed §7.70(i) does not require that a Mexican casualty insurance company acquire this software and incur the related expense. The cost of compliance as detailed in this Public Benefit/Cost Note portion of the proposal will be relatively more significant for carriers licensed in Texas for less than one year because of initial software acquisitions costs. Since the Department has routinely required the preparation and filing of substantially similar financial statements as required by the proposal for many years, most of these software costs for carriers licensed for one year or more have already been incurred.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 28, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be submitted simultaneously to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing on the proposal should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, oral and written comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new section is proposed under the Insurance Code §§802.001 - 802.003 and 802.051 - 802.056, which authorize the Commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true exhibit of their condition and methods of transacting business, and require certain insurers to make filings with the National Association of Insurance Commissioners; Chapters 2201, 2210, and 2211 and §§841.255, 842.003, 842.201, 842.202, 843.151, 843.155, 861.254, 861.255, 862.001, 862.003, 882.001, 882.003, 883.002, 883.204, 884.256, 885.401, 885.403 - 885.406, 887.009, 887.060, 887.401 - 887.407, 911.001, 911.304, 912.002, 912.201 - 912.203, 912.301, 941.252, 942.201, 961.002, 961.003, 961.052, 961.202, 982.004, 982.251 - 982.254, 982.101, 982.103, 984.101 - 984.103, 984.153, 984.201, 984.202, 1301.009, 1506.057, 2551.001, and 2551.152 which require the filing of financial reports and other information by insurers and other regulated entities and provide specific rulemaking authority to the Commissioner relating to those insurers and other regulated entities; §§982.001, 982.002, 982.004, 982.052, 982.102 - 982.104, 982.106, 982.108, 982.110 - 982.112, 982.201 - 982.204, 982.251 - 982.255, and 982.302 - 982.306 which provide the conditions under which foreign insurers are permitted to do business in this state and require foreign insurers to comply with the provisions of the Insurance Code; §§844.001 - 844.005, 844.051 - 844.054, and 844.101 which authorize the Commissioner to adopt rules to implement the regulation of nonprofit health corporations holding a certificate of authority under the Insurance Code, Title 2, Chapter 844; §421.001 which requires insurers to establish adequate reserves and provides for the adoption of each current formula for establishing reserves applicable to each line of insurance; §32.041 which requires the Department to furnish the statement blanks and other reporting forms necessary for companies to comply with the filing requirements; and §36.001 which provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following articles and sections of the Insurance Code will be affected by this proposed section: Chapters 2201, 2210, and 2211 and §§32.041, 421.001, 802.001 - 802.003, 802.051 - 802.056, 841.255, 842.003, 842.201, 842.202, 843.151, 843.155, 844.001 - 844.005, 844.051 - 844.054, 844.101, 861.254, 861.255, 862.001, 862.003, 882.001, 882.003, 883.002, 883.204, 884.256, 885.401, 885.403 - 885.406, 886.107, 887.009, 887.060, 887.401 - 887.407, 911.001, 911.304, 912.002, 912.201 - 912.203, 912.301, 941.252, 942.201, 961.002, 961.003, 961.052, 961.202, 982.001, 982.002, 982.004, 982.052, 982.101, 982.102, 982.103, 982.104, 982.106, 982.108, 982.110 - 982.112, 982.251 - 982.255, 982.302 - 982.306, 984.153, 984.201, 984.202, 1301.009, 1506.057, 2551.001, and 2551.152.

§7.70. Requirements for Filing the 2007 Quarterly and 2007 Annual Statements, the 2008 Quarterly Statements, Other Reporting Forms, and Electronic Data Filings, with the Texas Department of Insurance and the NAIC.

(a) Scope. This section specifies the requirements for insurers and other regulated entities for filing the 2007 quarterly statements, 2007 annual statement, 2008 quarterly statement blanks, other reporting forms, and electronic data filings, with the department and the National Association of Insurance Commissioners (NAIC) necessary to report information concerning the financial condition and business operations and activities of insurers. This section applies to all insurers and certain other regulated entities authorized to do the business

of insurance in this state and includes, but is not limited to, life insurers; accident insurers; life and accident insurers; life and health insurers; accident and health insurers; life, accident and health insurers; mutual life insurers; stipulated premium insurers; group hospital service corporations; fire insurers; fire and marine insurers; U.S. branches of alien insurers; Mexican casualty insurers; general casualty insurers; fire and casualty insurers; mutual insurers other than life; statewide mutual assessment companies; local mutual aid associations; mutual burial associations; exempt associations; county mutual insurers; Lloyd's plans; reciprocal and inter-insurance exchanges; domestic risk retention groups; domestic joint underwriting associations; title insurers; fraternal benefit societies; farm mutual insurers; health maintenance organizations; nonprofit health corporations; nonprofit legal services corporations; the Texas Health Insurance Risk Pool; the Texas Mutual Insurance Company; the Texas Windstorm Insurance Association; and the Texas FAIR Plan Association. The commissioner adopts by reference the 2007 quarterly statement blanks, the 2007 annual statement blanks, the 2008 quarterly statement blanks, and the related instruction manuals published by the NAIC, and other supplemental reporting forms specified in this section. The forms are available from the Texas Department of Insurance, Financial Analysis and Examination Division, Mail Code 303-1A, P.O. Box 149104, Austin, Texas 78714-9104. The NAIC annual and quarterly statement blanks and other NAIC supplemental reporting forms can be printed or filed electronically using annual statement software available from vendors. Insurers and other regulated entities shall properly report to the department and the NAIC by completing, in accordance with applicable instructions, the appropriate hard copy annual and quarterly statement blanks, other reporting forms, and electronic data filings.

(b) Definition. In this section "Texas Edition" refers to the blanks and forms promulgated by the commissioner.

(c) Conflicts with other laws. In the event of a conflict between the Insurance Code, any currently existing department rule, form, instructions, or any specific requirement of this section and the NAIC instructions listed in this section, the Insurance Code, the department rule, form, instruction, or the specific requirements of subsections of this section shall take precedence and in all respects control.

(d) Filing requirements for life, accident and health insurers. Each life, life and accident, life and health, accident, accident and health, mutual life, or life, accident and health insurance company, stipulated premium company, group hospital service corporation, and the Texas Health Insurance Risk Pool shall complete and file the blanks, forms, or electronic data filings as directed in this subsection. This subsection does not apply to entities licensed as health maintenance organizations under the Insurance Code Chapter 843. Insurers specified in this subsection and engaged in business authorized under the Insurance Code Chapter 843 may have additional reporting requirements under subsection (h) of this section. Insurers described under this subsection may elect to file on the 2007 Health Quarterly Statement for the three quarters of 2007, the 2007 Health Annual Statement for year-end 2007, and on the 2008 Health Quarterly Statement for the three quarters of 2008, if the insurer passes the Health Statement Test as outlined in the "2007 Annual Statement, Health Instructions." If a reporting entity qualifies under this subsection to use the 2007 Health Annual Statement, it must continue to use that annual statement for a minimum of three years or obtain written approval from the department to change to another type of annual statement. Insurers filing the 2007 Life, Accident and Health Annual Statement, the 2007 Life, Accident and Health Quarterly Statements, and the 2008 Life, Accident and Health Quarterly Statements, and the supplemental forms and reports identified in these subsections shall complete filings in accordance with the "2007 Annual Statement Instructions, Life, Accident and Health," the "2007 Quarterly Statement Instructions, Life, Accident and Health," and the "2008 Quarterly Statement Instructions, Life, Accident and Health," as applicable. Life insurers meeting the test set forth in this subsection to file the 2007 Health Annual Statement and the supplemental forms and reports identified in these subsections shall complete filings in accordance with the "2007 Annual Statement Instructions, Health," the "2007 Quarterly Statement Instructions, Health," and the "2008 Quarterly Statement Instructions, Health," as applicable. The electronic filings of these forms or reports with the NAIC shall be in accordance with the NAIC data specifications and instructions for electronic filing and shall include PDF format filing. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed with the department and the NAIC: 2007 Life, Accident and Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2007. A Texas stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly data filings with the NAIC if it meets all three of the following conditions:

(A) it is authorized to write only life insurance on its certificate of authority;

(B) it collected premiums in the prior calendar year of less than $1 million; and

(C) it had a profit from operations in the prior two calendar years.

(2) Domestic insurer reports and forms in paper copy to be filed only with the department as follows:

(A) 2007 Life, Accident and Health Annual Statement, including the printed investment schedule detail, due on or before March 1, 2008 (stipulated premium companies, April 1, 2008);

(B) 2007 Life, Accident and Health Annual Statement of the Separate Accounts for the 2007 calendar year (required of companies maintaining separate accounts), due on or before March 1, 2008;

(C) 2008 Life, Accident and Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2008. A Texas stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly data filings with the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years;

(D) 2007 Health Annual Statement, including the printed investment schedule detail, due on or before March 1, 2008 if the company qualifies as described in this subsection;

(E) 2007 Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2007 if the company qualifies as described in this subsection;

(F) 2008 Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2008 if the company qualifies as described in this subsection;

(G) All the paper copies of the annual and quarterly supplements prepared and filed on dates specified in the forms and instructions;

(H) Management's Discussion and Analysis, due on or before April 1, 2008;

(I) Statement of Actuarial Opinion, due on or before March 1, 2008 (stipulated premium companies, April 1, 2008). The actuarial opinion shall be prepared in accordance with paragraph (5) of this subsection;

(J) Schedule SIS, due on or before March 1, 2008. This filing is also required if filing a Health Annual Statement, as applicable;

(K) Supplemental Compensation Exhibit, due on or before March 1, 2008 (stipulated premium companies, April 1, 2008). This filing is also required if filing a Health Annual Statement, as applicable;

(L) The Texas Health Insurance Risk Pool shall file the 2007, Health Annual Statement, the 2007 Quarterly Statements, and the 2008 Quarterly Statements as follows:

(i) 2007 Health Annual Statement with only pages 1 - 6, and Schedule E Part 1, Part 2, and Part 3 to be completed and filed on or before March 1, 2008;

(ii) 2007 Health Quarterly Statements, with only pages 1 - 6, Schedule E, Part 1 - Cash, and Part 2 - Cash Equivalents to be completed and filed on or before May 15, August 15, and November 15, 2007;

(iii) 2008 Health Quarterly Statements, with only pages 1 - 6, Schedule E, Part 1 - Cash, and Part 2 - Cash Equivalents to be completed and filed on or before May 15, August 15, and November 15, 2008; and

(iv) The Texas Health Insurance Risk Pool is not required to file any reports, diskettes, or electronic data filings with the NAIC.

(M) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2008. (stipulated premium companies, April 1, 2008). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §451.151; otherwise, this form should not be filed; and

(N) Analysis of Surplus (Texas Edition) for life, accident and health insurers, due on or before March 1, 2008 (stipulated premium companies, April 1, 2008).

(3) Foreign companies filing only electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(4) Electronic filings with the NAIC by domestic and foreign insurers:

(A) 2007 Life, Accident and Health Annual Statement electronic filing and PDF filing, due on or before March 1, 2008 (stipulated premium companies, April 1, 2008);

(B) 2007 Life, Accident and Health Annual Statement of the Separate Accounts electronic filing and PDF filing, due on or before March 1, 2008;

(C) 2007 Life, Accident and Health Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2007. A Texas stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly electronic data filings with the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years;

(D) 2008 Life, Accident and Health Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2008. A Texas stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly electronic data filings with the NAIC if it meets all three of the following conditions:

(i) it is authorized to write only life insurance on its certificate of authority;

(ii) it collected premiums in the prior calendar year of less than $1 million; and

(iii) it had a profit from operations in the prior two calendar years.

(E) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for Schedule SIS and Supplemental Compensation Exhibit which are filed by domestic insurers only with the department in paper copy) due on the dates specified in the forms and instructions.

(5) Statement of Actuarial Opinion required by paragraph (2)(I) of this subsection shall be prepared in accordance with the following:

(A) Unless exempted, the Statement of Actuarial Opinion, attached to either the 2007 Life, Accident and Health Annual Statement or the 2007 Health Annual Statement, should follow the applicable provisions of §§3.1601 - 3.1608 of this title (relating to Actuarial Opinion and Memorandum Regulation).

(B) For those companies exempted from §§3.1601 - 3.1608 of this title, instructions 1 - 12, established by the NAIC, must be followed.

(C) Any company required by §3.4505(b)(3)(I) of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves) to opine on the application of X factors, shall attach this opinion to the 2007 Life, Accident and Health Annual Statement or the 2007 Health Annual Statement, as applicable.

(6) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(7) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for life, accident and health insurers with the department, on or before March 1, 2008.

(e) Requirements for property and casualty insurers. Each fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, county mutual insurance company, mutual insurance company other than life, Lloyd's plan, reciprocal or inter insurance exchange, domestic risk retention group, life insurance company that is licensed to write workers' compensation, any farm mutual insurance company that filed a property and casualty annual statement for the 2006 calendar year or had gross written premiums in 2007 in excess of $6 million, any Mexican casualty insurance company licensed under the Insurance Code Chapter 984, domestic joint underwriting association, the Texas Mutual Insurance Company, the Texas Windstorm Insurance Association, and the Texas FAIR Plan Association shall complete and file the following blanks, forms, and diskettes or electronic data filings as described in this subsection. The forms and reports

identified in this subsection shall be completed in accordance with the "2007 Annual Statement Instructions, Property and Casualty," the "2007 Quarterly Statement Instructions, Property and Casualty," and the "2008 Quarterly Statement Instructions, Property and Casualty," as applicable. The electronic filings with the NAIC shall be in accordance with the NAIC data specifications and instructions and shall include PDF format filing, as applicable. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed with the department and the NAIC: 2007 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2007.

(2) Domestic insurer reports and forms in paper copy to be filed only with the department as follows:

(A) 2007 Property and Casualty Annual Statement, due on or before March 1, 2008, including the printed investment schedule detail;

(B) 2008 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2008;

(C) 2007 Combined Property/Casualty Annual Statement, due on or before May 1, 2008. This statement is required only for those affiliated insurers that wrote more than $35 million in direct premiums as a group in calendar year 2007, as disclosed in Schedule T of the Annual Statement(s);

(D) All the paper copies of the annual and quarterly supplements prepared and filed on dates specified in the forms and instructions;

(E) The actuarial opinion submitted shall be prepared in accordance with the "2007 Annual Statement Instructions, Property and Casualty";

(F) Schedule SIS, due on or before March 1, 2008;

(G) Supplemental Compensation Exhibit, due on or before March 1, 2008;

(H) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2008. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(I) Texas Supplement for County Mutuals (Texas Edition) (required of Texas county mutual insurance companies only), due on or before March 1, 2008;

(J) Texas Supplemental "A" for County Mutuals (Texas Edition) (required of Texas county mutual insurance companies only), due on or before March 1, 2008;

(K) Analysis of Surplus (Texas Edition) for property and casualty insurers except Texas county mutual insurance companies, due on or before March 1, 2008;

(L) Actuarial Opinion Summary prepared in accordance with §7.9 of this title (relating to Examination of Actuarial Opinion for Property and Casualty Insurers);

(M) The Texas Windstorm Insurance Association shall complete and file the following:

(i) 2007 Property and Casualty Annual Statement, due on or before March 1, 2008;

(ii) 2007 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2007;

(iii) 2008 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2008; and

(iv) Management's Discussion and Analysis, due on or before April 1, 2008.

(v) The Texas Windstorm Insurance Association is not required to file any reports with the NAIC.

(N) The Texas FAIR Plan Association shall complete and file the following:

(i) 2007 Property and Casualty Annual Statement, due on or before March 1, 2008;

(ii) 2007 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2007;

(iii) 2008 Property and Casualty Quarterly Statements, due on or before May 15, August 15, and November 15, 2008;

(iv) Statement of Actuarial Opinion, due on or before March 1, 2008;

(v) Actuarial Opinion Summary prepared in accordance with §7.9 of this title; and

(vi) Management's Discussion and Analysis, due on or before April 1, 2008.

(vii) The Texas FAIR Plan Association is not required to file any reports with the NAIC.

(3) Foreign property and casualty insurers filing only electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(4) Electronic filings by domestic and foreign insurers to be filed with the NAIC:

(A) 2007 Property and Casualty Annual Statement electronic filing and PDF filing, due on or before March 1, 2008;

(B) 2007 Property and Casualty Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2007;

(C) 2008 Property and Casualty Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2008;

(D) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for electronic Schedule SIS and Supplemental Compensation Exhibit, required of domestic insurers only) due on the dates specified in the forms and instructions;

(E) Electronic combined insurance exhibit, due on or before May 1, 2008; and

(F) Combined annual statement electronic filing and PDF filing, due on or before May 1, 2008.

(5) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(6) A foreign insurer that files an application with the department for approval of a policyholder dividend shall file an Analysis of Surplus (Texas Edition) for property and casualty insurers with the application.

(7) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for property and casualty insurers with the department, on or before March 1, 2008.

(f) Requirements for fraternal benefit societies. Each fraternal benefit society shall complete and file the following blanks, forms, and electronic data filings for the three quarters for the 2007 calendar year, the 2007 calendar year, and the three quarters for the 2008 calendar year. The forms and reports identified in this subsection shall be completed in accordance with the "2007 Annual Statement Instructions, Fraternal," the "2007 Quarterly Statement Instructions, Fraternal," and the "2008 Quarterly Statement Instructions, Fraternal," as applicable. The electronic data filings with the NAIC shall be in accordance with the NAIC data specifications and instructions and shall include PDF format filing. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed with the department and the NAIC: 2007 Fraternal Quarterly Statements, due on or before May 15, August 15, and November 15, 2007.

(2) Domestic insurer reports and forms in paper copy to be filed only with the department, as follows:

(A) 2007 Fraternal Annual Statement, including the printed investment schedule detail, due on or before March 1, 2008;

(B) 2007 Fraternal Annual Statement of the Separate Accounts (required of companies maintaining separate accounts), due on or before March 1, 2008;

(C) 2008 Fraternal Quarterly Statements, due on or before May 15, August 15, and November 15, 2008;

(D) All the paper copies of the annual and quarterly supplements prepared and filed on dates specified in the forms and instructions;

(E) Management's Discussion and Analysis, due on or before April 1, 2008;

(F) Statement of Actuarial Opinion, due on or before March 1, 2008.

(G) Supplemental Compensation Exhibit, due on or before March 1, 2008;

(H) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2008. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(I) Analysis of Surplus (Texas Edition) for fraternal benefit societies, due on or before March 1, 2008.

(3) Foreign fraternal insurers filing only electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(4) Electronic filings by domestic and foreign insurers to be filed with the NAIC:

(A) 2007 Fraternal Annual Statement electronic filing and PDF filing, due on or before March 1, 2008;

(B) 2007 Fraternal Annual Statement of the Separate Accounts electronic filing and PDF filing, due on or before March 1, 2008;

(C) 2007 Fraternal Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2007;

(D) 2008 Fraternal Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2008; and

(E) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for the Supplemental Compensation Exhibit) due on the dates specified in the forms.

(5) Statement of Actuarial Opinion required by paragraph (2)(F) of this subsection shall be prepared in accordance with the following:

(A) Unless exempted, the Statement of Actuarial Opinion, attached to the 2008 Fraternal Annual Statement, should follow the applicable provisions of §§3.1601 - 3.1608 of this title.

(B) For those companies exempted from §§3.1601 - 3.1608 of this title, instructions 1 - 12, established by the NAIC, must be followed.

(C) Any company required by §3.4505(b)(3)(I) of this title to opine on the application of X factors, shall attach this opinion to the 2007 Fraternal Annual Statement, as applicable.

(6) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(7) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for fraternal benefit societies with the department on or before March 1, 2008.

(g) Requirements for title insurers. Each title insurance company shall complete and file the following blanks and forms for the three quarters of the 2007 calendar year, the 2007 calendar year, and the three quarters of the 2008 calendar year. The reports and forms identified in this subsection shall be completed in accordance with the "2007 Annual Statement Instructions, Title," the "2007 Quarterly Statement Instructions, Title," and the 2008 Quarterly Statement Instructions, Title," as applicable. The electronic version of the filings with the NAIC identified in this subsection shall be in accordance with the NAIC data specifications and instructions and shall include PDF format filing. The filings for insurers described in this subsection are as follows:

(1) Domestic insurer reports and forms in paper copy to be filed with the department and the NAIC: 2007 Title Quarterly Statements, due on or before May 15, August 15, and November 15, 2007.

(2) Domestic insurer reports and forms in paper copy to be filed only with the department as follows:

(A) 2007 Title Annual Statement, including printed investment schedule details, due on or before March 1, 2008;

(B) 2008 Title Quarterly Statements, due on or before May 15, August 15, and November 15, 2008;

(C) All the paper copies of the annual and quarterly supplements prepared and filed on dates described in the forms and instructions;

(D) Management's Discussion and Analysis, due on or before April 1, 2008;

(E) Statement of Actuarial Opinion, due on or before March 1, 2008;

(F) Supplemental Compensation Exhibit, due on or before March 1, 2008;

(G) Schedule SIS, due on or before March 1, 2008;

(H) Texas Overhead Assessment Exemption Form (Texas Edition), due on or before March 1, 2008. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(I) Analysis of Surplus (Texas Edition) for title companies, due on or before March 1, 2008.

(3) Foreign companies filing electronically with the NAIC and not filing a paper copy with the department shall file a signed jurat page with the department in lieu of filing the entire paper filing.

(4) Electronic filings with the NAIC by domestic and foreign insurers:

(A) 2007 Title Annual Statement electronic filings and PDF filings, due on or before March 1, 2008;

(B) 2007 Title Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2007;

(C) 2008 Title Quarterly Statement electronic filings and PDF filings, due on or before May 15, August 15, and November 15, 2008;

(D) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for Schedule SIS and Supplemental Compensation Exhibit which are only filed by domestic insurers with the department in paper copy) due on the dates specified in the forms and instructions;

(E) Management Discussion and Analysis, due on or before April 1, 2008; and

(F) Statement of Actuarial Opinion, due on or before March 1, 2008.

(5) The commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC.

(6) A foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 shall file an Analysis of Surplus (Texas Edition) for title insurers on or before March 1, 2008.

(h) Requirements for health maintenance organizations. Each health maintenance organization licensed pursuant to the Insurance Code Chapter 843 shall complete the 2007 Quarterly Statements, the 2007 Health Annual Statement, and the 2008 Quarterly Statements. Insurers that are subject to life insurance statutes and are permitted or allowed to do the business of health maintenance organizations shall file the Texas HMO supplement forms as part of their annual and quarterly statement filings. The forms and reports required in this subsection shall be completed in accordance with the "2007 Annual Statement Instructions, Health," and the 2007 Quarterly Statement Instructions, Health," and the 2008 Quarterly Statement Instructions, Health," as applicable. The Texas supplemental forms required in this subsection and provided by the department shall be completed in accordance with the instructions on the forms. The Statement of Actuarial Opinion shall include the additional requirements of the department set forth in paragraph (2)(D) of this subsection. The electronic data filings with the NAIC shall be in accordance with NAIC data specifications and instructions and shall include PDF format filing. The Texas specific electronic filings regarding HMO data requested by the department shall be filed in accordance with the instructions provided by the department. The filings for insurers described in this subsection are as follows:

(1) Domestic and foreign insurer reports and forms in paper copy to be filed with the department and the NAIC: 2007 Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2007. With each quarterly filing, include an up-to-date and completed Schedule E - Part 3 - Special Deposits, utilizing the format from the 2006 Health Annual Statement.

(2) Domestic and foreign insurer reports and forms in paper copy to be filed only with the department:

(A) 2007 Health Annual Statement, including printed investment schedule detail, due on or before March 1, 2008;

(B) 2008 Health Quarterly Statements, due on or before May 15, August 15, and November 15, 2008. With each quarterly filing, include an up-to-date and completed Schedule E - Part 3 - Special Deposits, utilizing the format from the 2007 Health Annual Statement;

(C) Management's Discussion and Analysis, due on or before April 1, 2008; and

(D) Statement of Actuarial Opinion, due on or before March 1, 2008. In addition to the requirements set forth in the "2007 Annual Statement Instructions, Health," the department requires that the actuarial opinion include the following:

(i) The Statement of Actuarial Opinion must include assurance that an actuarial report and underlying actuarial work papers supporting the actuarial opinion will be maintained at the company and available for examination for seven years. The foregoing must be available by May 1 of the year following the year end for which the opinion was rendered or within two weeks after a request from the commissioner. The suggested wording used will depend on whether the actuary is employed by the company or is a consulting actuary. The wording for an actuary employed by the company should be similar to the following: "An actuarial report and any underlying actuarial work papers supporting the findings expressed in this Statement of Actuarial Opinion will be retained for a period of seven years in the administrative offices of the company and available for regulatory examination." The wording for a consulting actuary retained by the company should be similar to the following: "An actuarial report and any underlying actuarial work papers supporting the findings expressed in this Statement of Actuarial Opinion have been provided to the company to be retained for a period of seven years in the administrative offices of the company and available for regulatory examination."

(ii) Under the scope paragraph requirements of section 5 of the "2007 Annual Statement Instructions, Health," relating to the Actuarial Certification, the department requires that the actuarial opinion specifically list the premium deficiency reserve as an item and disclose the amount of such reserve.

(3) Domestic insurer reports and forms to be filed with the department:

(A) Supplemental Compensation Exhibit in paper copy only, due on or before March 1, 2008;

(B) Texas Overhead Assessment Exemption Form (Texas Edition) in paper copy only, due on or before March 1, 2008. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(C) Texas HMO Supplement Annual (Texas Edition), in paper copy and electronic filing, containing annual data for calendar year 2007, to be completed according to the instructions provided by the department, due on or before March 1, 2008.

(D) Texas HMO Supplement Quarterly (Texas Edition), in paper copy and electronic filings;

(i) containing quarterly statement data for calendar-year 2007, to be completed according to the instructions provided by the department, due on or before May 15, August 15, and November 15, 2007; and

(ii) containing quarterly statement data for calendar-year 2008, to be completed according to the instructions provided by the department, due on or before May 15, August 15, and November 15, 2008.

(4) Electronic filings with the NAIC by domestic and foreign insurers:

(A) 2007 Health Annual Statement electronic filing, and PDF filing, due on or before March 1, 2008;

(B) 2007 Health Quarterly statement electronic filing and PDF filing, due on or before May 15, August 15, and November 15, 2007;

(C) 2008 Health Quarterly Statement electronic filing and PDF filing, due on or before May 15, August 15, and November 15, 2008;

(D) All annual and quarterly supplemental electronic filings together with the related PDF filings (except for Schedule SIS and Supplemental Compensation Exhibit which are only filed by domestic insurers with the department in paper copy) due on the dates specified in the forms and instructions;

(E) Statement of Actuarial Opinion, due on or before March 1, 2008; and

(F) Management Discussion and Analysis, due on or before April 1, 2008.

(i) Requirements for farm mutual insurers not subject to the provisions of subsection (e) of this section. Farm mutual insurance companies not subject to subsection (e) of this section shall file the following blanks and forms for the 2007 calendar year with the department only, on or before March 1, 2008:

(1) Annual Statement (Texas Edition);

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(3) Statement of Actuarial Opinion, unless exempted under §7.31 of this title (relating to Annual Statement Instructions for Farm Mutual Insurance Companies).

(j) Requirements for statewide mutual assessment associations, local mutual aid associations, mutual burial associations and exempt associations. Each statewide mutual assessment association, local mutual aid association, mutual burial association and exempt association shall complete and file the following blanks and forms for the 2007 calendar year with the department only, on or before April 1, 2008:

(1) Annual Statement (Texas Edition) (exempt companies are required to complete all pages except lines 22, 23, 24, 25, and 26 on page 3, the special instructions at the bottom of page 3, and pages 4 - 7);

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(3) Release of Contributions Form (Texas Edition);

(4) 3-1/2 Percent Chamberlain Reserve Table (Reserve Valuation) (Texas Edition);

(5) Reserve Summary (1956 Chamberlain Table 3-1/2 Percent) (Texas Edition);

(6) Inventory of Insurance in Force by Age of Issue or Reserving Year (Texas Edition); and

(7) Summary of Inventory of Insurance in Force by Age and Calculation of Net Premiums (Texas Edition).

(k) Requirements for nonprofit legal service corporations. Each nonprofit legal service corporation doing business as authorized by a certificate of authority issued under the Insurance Code Chapter 961 shall complete and file the following blanks and forms for the 2007 calendar year with the department only. An actuarial opinion is not required. The following forms are to be filed on or before March 1, 2008:

(1) Annual Statement (Texas Edition); and

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed.

(l) Requirements for Mexican casualty insurance companies. Each Mexican casualty insurance company doing business as authorized by a certificate of authority issued under the Insurance Code Chapter 984, shall complete and file the following blanks and forms for the 2007 calendar year with the department only. All submissions shall be printed or typed in English and all monetary values shall be clearly designated in United States dollars. The form identified in paragraph (1) of this subsection shall be completed to the extent specified in paragraph (1) of this subsection and in accordance with the "2007 Annual Statement Instructions, Property and Casualty." An actuarial opinion is not required. It is the express intent of this subsection that it shall not repeal or otherwise modify or amend any department rule or the Insurance Code. The following blanks or forms are to be filed on or before March 1, 2008:

(1) 2007 Property and Casualty Annual Statement; provided, however, only pages 1 - 4, and 104 (Schedule T) are required to be completed;

(2) A copy of the balance sheet and the statement of profit and loss from the Mexican financial statement (printed or typed in English);

(3) A copy of the official documents issued by the Comisión Nacional de Seguros y Fianzas approving the 2007 annual statement; and

(4) A copy of the current license to operate in the Republic of Mexico.

(m) Other financial reports. Nothing in this section prohibits the department from requiring any insurer or other regulated entity from filing other financial reports with the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 17, 2007.

TRD-200706397
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 463-6327

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CHAPTER 10. WORKERS' COMPENSATION HEALTH CARE NETWORKS

SUBCHAPTER H. EXAMINATIONS

28 TAC §10.200

The Texas Department of Insurance (Department) proposes new §10.200, concerning assessments to cover the expenses of examining workers' compensation health care networks certified pursuant to Insurance Code, Chapter 1305, the Workers' Compensation Health Care Network Act. The proposed new section is necessary to implement S.B. 1253, 80th Legislature, Regular Session. Senate Bill 1253 amended Insurance Code, §1305.251, to require a certified workers' compensation health care network (network) to pay a fee for Department examinations conducted under §1305.251 (relating to examination of networks) or §1305.252 (relating to general standards for retrospective review) in an amount set by the Commissioner and in accordance with rules adopted by the Commissioner. Pursuant to §1305.252(c), the fee is to be paid for the expenses of an examination that are incurred by the Commissioner or under the Commissioner's authority and that are directly attributable to that examination, including the actual salaries and expenses of the examiners directly attributable to that examination.

The proposed new section is necessary to establish matters the Commissioner will consider to determine the amount of the fee to be paid by a network for the expense of an examination conducted under Insurance Code §1305.251 or §1305.252. Additionally, the proposed new section is necessary to specify the time in which such a fee must be paid.

In accordance with §1305.252(c) of the Insurance Code, examination fees set by the Commissioner shall include the actual salary and expenses of an examiner directly attributable to the examination of the network. The fees established under this proposed new section will be in addition to, and not in lieu of, any other charge that is required by law.

Proposed §10.200(a) provides that, in accordance with Insurance Code, §1305.251, a network shall pay to the Department an examination fee for expenses directly attributable to an examination of the network conducted pursuant to Insurance Code §1305.251 or §1305.252.

Proposed §10.200(b) specifies that the examination fee shall consist of the actual salary and expenses of the examiners directly attributable to the examination. Proposed §10.200(b)(1) describes how to calculate the part of an examiner's salary included in the examination fee, and proposed §10.200(b)(2) describes the expenses included in the examination fee.

Proposed §10.200(c) requires that an examination fee paid pursuant to the section shall be payable and due to the Texas Department of Insurance, P.O. Box 149104, Mail Code 108-3A, Austin, Texas 78714-9104, no later than 30 days from the invoice date.

FISCAL NOTE. Margaret Lazaretti, Deputy Commissioner, Health and Workers' Compensation Networks Division, has determined that, for the first five-year period the proposed new section is in effect, the anticipated fiscal impact on state government is estimated income of $1,500 per examination to the Texas Department of Insurance operating account as a result of the enforcement or administration of the proposal. There will be no fiscal implications for local government as a result of enforcing or administering the section, and there will be no effect on local employment or the local economy.

PUBLIC BENEFIT/COST NOTE. Ms. Lazaretti also has determined that, for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the section will be the establishment of adequate and reasonable fees to defray the Department's expenses of examinations of workers' compensation certified networks pursuant to Insurance Code §1305.251 or §1305.252. Ms. Lazaretti has determined that the direct economic cost to entities required to comply with the proposal will vary based on factors arising from the particulars of a specific examination, such as: the length of time an examination requires; whether there is a need to do an examination on-site; and, if an onsite examination is conducted, the physical location of the books, records, or premises that are examined.

The costs for entities required to comply with the proposal will consist of the actual salary of the examiner directly attributable to the examination and the actual expenses of the examiner directly attributable to the examination, including transportation, lodging, meals, subsistence expenses, and parking fees. The actual salary of an examiner is to be determined by dividing the annual salary of the examiner by the total number of working days in a year, then dividing that amount by the number of hours in a working day. The actual salary included in an examination fee shall be the part of the annual salary attributable to each hour the examiner examines the network.

The Department anticipates that an examination of a certified network will entail the same amount of time as an examination of a Health Maintenance Organization (HMO) that is of similar organizational size and structure. This is because similar data and information will be reviewed and similar procedures will be followed. Therefore, based upon the fees charged for the Department's examination of an HMO, it is anticipated that an average fee for an examination of a certified network will be approximately $1,500.00.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY

ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code, §2006.002(c), the Department has determined that the proposal may have an adverse economic effect on approximately five small or micro businesses that are required to comply with the proposed rules. Adverse economic impact may result from costs associated with the amount of the required examination fee resulting from this proposal. The cost of compliance will not vary between large

businesses and small or micro businesses, and the Department's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro businesses. The total cost of compliance to large businesses and small or micro businesses is not dependent upon the size of the business, but rather is dependent upon the length of time an examination lasts, and whether an examination is conducted onsite (resulting in expenses associated with travel to the site).

In accordance with the Government Code, §2006.002(c-1), the Department has considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to promulgate a fee, as required by S.B. 1253, for examination of certified networks conducted under §1305.251 or §1305.252 that is sufficient to cover the Department's costs for the examination, including expenses that are directly attributable to the examination.

The other regulatory methods considered by the Department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not adopting the proposed regulation; (ii) implementing different requirements or standards for small and micro-businesses; and (iii) performing remote examinations when possible, thereby reducing the fee charged for an examination.

Not adopting the proposed regulation. If this proposal were not adopted, certified workers' compensation networks, including small or micro businesses would not be able to comply with the statutory requirement that a certified network pay a fee, in accordance with rules adopted by the Commissioner of Insurance, for examinations conducted under §1305.251 and §1305.252. Without a rule, the Department would not have the means to recover examination costs. The Department rejected this approach because it would not accomplish the objective of the statute or the rule proposal and would not be consistent with the intent of the legislature in requiring payment of the fee.

Implementing different requirements or standards for small and micro businesses. If the proposal were not made applicable to small or micro businesses or if the proposal set a smaller examination fee for small or micro businesses, the proposed amendments would not have an adverse economic effect on small or micro businesses or would have a smaller possible adverse economic effect on small or micro businesses. However, §1305.251 of the Labor Code mandates that a network pay an examination fee based on expenses that "are directly attributable to that examination." The Department rejected this approach because a reduced examination fee would not be based on the actual expenses of the examination, as required by the Insurance Code.

Performing remote examinations when possible, thereby reducing the fee charged for an examination. Insurance Code, §1305.251 and §1305.252 authorize the Department to conduct examinations either remotely or on-site. The Department anticipates that an examination fee for a remote examination would likely be lower than the examination fee for an on-site examination, because the examination fee for a remote examination would not include such expenses as transportation, lodging, meals, or parking fees. The Department has determined that this approach will achieve the purpose of the proposed rule and reduce the economic impact on small or micro businesses; therefore, the Department will exercise regulatory flexibility by conducting examinations remotely, when possible.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code, §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 28, 2008 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Margaret Lazaretti, Deputy Commissioner, Health and Workers' Compensation Networks Division, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new section is proposed under the Insurance Code §§1305.251, 1305.007, and 36.001. Section 1305.251 requires a certified workers' compensation health care network to pay a fee to the Department in an amount set by the Commissioner and in accordance with rules adopted by the Commissioner for the expenses of an examination conducted under §1305.251 or §1305.252 that are incurred by the Commissioner or under the Commissioner's authority and are directly attributable to that examination, including the actual salaries and expenses of the examiners directly attributable to that examination, as determined under rules adopted by the Commissioner. Section 1305.007 provides that the Commissioner may adopt rules as necessary to implement Insurance Code, Chapter 1305, the Workers' Compensation Health Care Networks Act. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §1305.251 and §1305.252.

§10.200. Fee for Examination of a Certified Workers' Compensation Health Care Network.

(a) As provided in Insurance Code §1305.251, a network shall pay to the department an examination fee set by the Commissioner for expenses directly attributable to an examination of the network conducted pursuant to Insurance Code §1305.251 or §1305.252.

(b) The examination fee shall include the actual salary and expenses of the examiners directly attributable to the examination.

(1) The actual salary of an examiner is determined by dividing the annual salary of the examiner by the total number of working days in a year, then dividing that amount by the number of hours in a working day. The actual salary included in an examination fee shall be the part of the annual salary attributable to each hour the examiner examines the network.

(2) The expenses included in an examination fee shall be those actually incurred by the examiner and directly attributable to the examination, including the actual cost of:

(A) transportation,

(B) lodging,

(C) meals,

(D) subsistence expenses,

(E) parking fees, and

(F) department overhead expense.

(c) An examination fee paid pursuant to this section shall be payable and due to the Texas Department of Insurance, P.O. Box 149104, Mail Code 108-3A, Austin, Texas 78714-9104, no later than 30 days from the invoice date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 17, 2007.

TRD-200706394
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 465-6327

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §1.82

The Texas Department of Transportation (department) proposes amendments to §1.82, Statutory Advisory Committee Operations and Procedures.

EXPLANATION OF PROPOSED AMENDMENTS

The statutory advisory committees of the department are required by 43 TAC §1.82(c)(1) to post and hold their meetings in accordance with the open meetings law, Government Code, Chapter 551. That requirement is not imposed by the open meetings law or any other statute. This rule subjects advisory committees and their members to the enforcement provisions of the open meetings laws and to all of the technical requirements that the courts and the attorney general have determined are a part of the open meetings law. The open meetings law requirements impose a heavy burden on members of advisory committees, who are often members of the general public rather than elected or appointed government officials, whose only duties are to offer considered advice to the department, and who have no policy making powers or management or supervisory authority over any of the department's functions.

Section 1.82 prescribes rules governing the operations and procedures of department advisory committees that are created specifically by state law.

Amendments to §1.82(c), Meetings, provide that instead of subjecting the advisory committees to the requirements of the state's open meetings law, the advisory committees would be required to follow the specific requirements set out in the rule. The rule requires publication in the *Texas Register* of a 10-day notice of each meeting of an advisory committee, requires each meeting of an advisory committee to be open to the public, and requires an advisory committee to follow the agenda set for the meeting. The changes ensure that the activities of the advisory committees would remain open to the public but remove unnecessary requirements of the present rules.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Jackson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be enhanced and more efficient communication between the department and the public. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §1.82 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 28, 2008.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §21.003, Transportation Code, §55.009, Transportation Code, §201.114, and Transportation Code, §455.004 which authorize the commission to adopt rules to govern the operations of the respective advisory committees.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, and Transportation Code, §21.003, Transportation Code, §§21.106 - 21.109, Transportation Code, §55.006, Transportation Code, §201.114, Transportation Code, §201.6011, and Transportation Code, §455.004.

§1.82. Statutory Advisory Committee Operations and Procedures.

(a) Applicability. This section applies to statutory advisory committees and governs the operation of statutory advisory committees unless it is superceded by a specific provision in §1.84 of this subchapter.

(b) Election of officers and terms of members.

(1) Unless otherwise specified with regard to a particular committee, each committee shall elect a chair and vice-chair by majority vote of the members of the committee. The chair and vice-chair shall each be elected for a term of not less than one year and not more than two years. Once elected, the chair and vice-chair may stand for reelection, without limit on the number of consecutive terms.

(2) Members shall serve on an advisory committee until new members are appointed.

(c) Meetings.

(1) Meeting [~~Open meeting~~] requirements. The office designated for an advisory committee under subsection (f) of this section shall publish notice of a meeting of the advisory committee in the *Texas Register* at least 10 days before the date of the meeting. The notice must provide the date, time, place, and subject of the meeting. A meeting of an advisory committee must be open to the public. An advisory committee will follow the agenda set for each meeting under paragraph (2) of this subsection. [~~Advisory committees shall post and hold all meetings in accordance with the provisions applicable to meetings of the commission under the Texas Open Meetings Act, Government Code, Chapter 551.~~] Filing of notice of [~~open~~] meetings with the Secretary of State shall be coordinated through the department's Office of General Counsel.

(2) Scheduling of meetings. Meeting dates, times, places, and agendas will be set by the office designated under subsection (f) of this section. Any committee member may suggest the need for a meeting or an agenda item, provided that the committee may only discuss items that are within the committee's and the department's jurisdiction. The office designated under subsection (f) of this section will provide notice of the time, date, place, and purpose of meetings to the members, by mail, email, telephone or any combination of the three, at least 10 calendar days in advance of each meeting. All meetings must take place in Texas and must be held in a location that is readily accessible to the general public.

(3) Quorum. A majority of the membership of an advisory committee, including the chairman, constitutes a quorum. The committee may act only by majority vote of its membership.

(4) Removal. A committee member may be removed at any time without cause by the person or entity that appointed the member or by that person's or entity's successor.

(5) Parliamentary procedure. Parliamentary procedures for all committee meetings shall be in accordance with the latest edition of Robert's Rules of Order, except that the chair may vote on any action as any other member of the committee, and except to the extent that Robert's Rules of Order are inconsistent with any statute or this subchapter.

(6) Record. Minutes of all committee meetings shall be prepared and filed with the commission. The complete proceedings of all committee meetings must also be recorded by electronic means.

(7) Public information. All minutes, transcripts, and other records of the advisory committees are records of the commission and as such may be subject to disclosure under the provisions of Government Code, Chapter 552.

(d) Reimbursement. The department may, if authorized by law and the executive director, reimburse a member of a committee for reasonable and necessary travel expenses. Current rules and laws governing reimbursement of expenses for state employees shall govern reimbursement of expenses for advisory committee members.

(e) Conflict of interest. Advisory committee members are subject to the same laws and policies governing ethical standards of conduct as those for commission members and employees of the department.

(f) Administrative support. For each advisory committee, the executive director will designate an office of the department that will be responsible for providing any necessary administrative support essential to the functions of the committee.

(g) Advisory committee recommendations. In developing department policies, the commission will consider the recommendations submitted by advisory committees.

(h) Manner of reporting.

(1) The office designated under subsection (f) of this section shall, in writing, report to the commission an official action of a statutory advisory committee, including any advice and recommendations, prior to commission action on the issue. The chair of the advisory committee or the chair's designee will also be invited by the department to appear before the commission prior to commission action on a posted agenda item to present the committee's advice and recommendations.

(2) In the event a written report cannot be furnished to the commission prior to commission action, the report may be given orally, provided that a written report is furnished within 10 days of commission action.

(i) Duration. Except as otherwise specified in this subchapter, each statutory advisory committee is abolished December 31, 2009, unless the commission amends its rules to provide for a different date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706358
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 463-8683

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CHAPTER 18. MOTOR CARRIERS

The Texas Department of Transportation (department) proposes amendments to §18.1, Purpose, §18.2, Definitions, §18.10, Purpose, §18.11, Motor Carrier Registration, §18.13, Application for Motor Carrier Registration, §18.14, Expiration and Renewal of Commercial Motor Vehicle Registration, §18.16, Insurance Requirements; new §18.18, Unified Carrier Registration System; amendments to §18.19, Short-term Lease and Substitute Vehicles, §18.31, Investigations and Inspections of Motor Carrier Records, §18.32, Motor Carrier Records, §18.70, Purpose, §18.71, Administrative Penalties, §18.72, Suspension and Revocation; new §18.73, Administrative Proceedings, §18.74, Settlement Agreements, §18.75, Implications for Nonpayment of Penalties, and §18.76, Registration Suspension Ordered under Family Code, all concerning motor carriers.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

The proposed amendments and new sections are necessary to implement the provisions of House Bills 2093 and 2094, 80th Legislature, Regular Session, 2007 and to clarify existing information.

House Bill 2093 provides the department additional regulatory authority over motor carriers and the issuance of overweight and oversize permits. The bill increases the department's authority to investigate, enforce, and impose administrative penalties and

sanctions on motor carriers for violations of any statute, rule, or order.

The bill also authorizes the department to enter the federal Unified Carrier Registration (UCR) system. The UCR system replaced the Single State Registration System (SSRS) as of January 1, 2007. As a participant in the UCR system the department will facilitate the federal registration of interstate motor carriers.

In addition to changes to the motor carrier registration enforcement procedures, House Bill 2093 also provided for administrative enforcement of commercial motor vehicle overweight or oversize permit violations. The administrative procedures outlined in these rules will also be used for administrative actions involving violations of Transportation Code, Chapter 623.

House Bill 2094 transfers the regulatory authority for tow trucks and vehicle storage facilities from the department to the Texas Department of Licensing and Regulation (TDLR). As of January 1, 2008 TDLR will be responsible for all aspects of regulating these entities. Due to the transfer of responsibilities, §18.1, §18.2, §18.10, §18.11, §18.13, §18.14, §18.16, §18.19, and §18.32, are amended to delete references to tow trucks and vehicle storage facilities.

Amendments to §18.2, Definitions, amend the definition of commercial motor vehicle to exclude tow trucks permitted to operate by TDLR and certain motor vehicles registered under the UCR system. Under Transportation Code, §643.002 tow trucks licensed by TDLR are excluded from the motor carrier registration requirements, therefore the provisions of 43 TAC Chapter 18 do not apply. This section also adds the definition of Unified Carrier Registration (UCR) and deletes the definitions of consent and nonconsent tows.

Amendments to §18.14, Expiration and Renewal of Commercial Motor Vehicle Registration, add clarification as to when a motor carrier registered under the federal UCR program must also renew under the state motor carrier registration system. Motor carriers operating as charter buses, household goods movers, and recyclable material and waste carriers are also required to maintain state motor carrier registration. Other motor carriers registered under UCR only have to make an initial state registration if the carrier has never been registered in the state or if for some reason the UCR registration is not continuous. If the UCR registration lapses or is revoked or suspended for any reason the motor carrier must file a new registration packet with the state under the provisions of §18.11.

New §18.18 provides that the state, through the department, will participate in the UCR system. The department participated in the SSRS prior to the implementation of the UCR program. All interstate motor carriers operating in Texas are required to register with the UCR system. The department will provide the service necessary for the motor carriers to submit their UCR registration.

Amendments to §18.31, Investigations and Inspections of Motor Carrier Records, adds that the department can enter a motor carrier's place of business to investigate violations under Transportation Code, Chapter 645. Transportation Code, §645.003 provides the department with the authority to enforce Chapter 645 and rules adopted under that chapter. To enforce the rules and statutes the department must have access to investigate the violations.

Section 18.31 is further amended by adding a new provision to allow investigators to set appointments for records inspections by certified mail or facsimile. The current rules require the two parties to agree to a location and time if the motor carrier's normal business hours are not sufficient. By allowing investigators to set a time for inspection of records motor carriers will be unable avoid sanctions by withholding access to records.

Amendments to §18.32, Motor Carrier Records, reformat the language of subsection (a) by adding proof of registration fee payments to the list of general records that must be maintained by the motor carrier at its principal place of business. The specific language referring to registration receipts under SSRS in paragraph (4) is deleted. The deleted language is no longer necessary since SSRS is no longer operational. However, the department will still require that the motor carrier maintain proof of all registration fee payments.

Amendments to §18.70, Purpose, allow for denial of registration as an administrative sanction for violations of Transportation Code, Chapter 643 or any rule or order adopted under Transportation Code, Chapter 643, as authorized under House Bill 2093.

Amendments to §18.71(a), Definition, delete the definition of "director" as it is no longer necessary to have a specific definition for the director due to the new administrative enforcement process.

Subsections 18.71(b) and (c) are redesignated as subsections (a) and (b) and are amended by adding rules or orders to the list of violations in which the department can seek administrative penalties. House Bill 2093 increased the department's authority by authorizing administrative sanctions and penalties for violations of any rule adopted under Transportation Code, Chapters 643 or 645 and also any order issued under those chapters.

Section 18.71 is further amended by deleting language that referenced the current administrative enforcement process. Subsections (e) - (j) are deleted. House Bill 2093 established a new administrative hearing process which is detailed in §18.73.

Amendments to §18.72, Suspension and Revocation, address changes to the statute regarding the types of authorized administrative sanctions. In addition to suspending and revoking a motor carrier's registration the department now has the authority to deny registration to a motor carrier who fails to comply with registration requirements. The section is also amended to authorize sanctions for failing to comply with any 43 TAC Chapter 18 rule or any order issued pursuant to an action taken under that chapter.

Amendments to §18.72(b), Department of Public Safety, remove the requirement that the request for administrative action on safety violation suspension come from the executive director of the Department of Public Safety. As amended the rule requires the request to be in writing and to include evidence of the violation. This will streamline this process and allow the department to address safety violations in a timely manner.

Section 18.72(c), the subsection heading is changed from Action without hearing, to Probation. The changes to the subsection provide guidance on the issuance of probation as an administrative sanction. The language provides additional guidance the department will consider in determining whether a motor carrier is eligible for probation. This section also provides that the department will set the length of the probation by reviewing the seriousness of the offense and previous violation by the motor carrier. These guidelines will help ensure that the department is consistent in administering the probation program.

Subsections 18.72(d),(e), and (g), regarding the administrative process, are deleted because of the new process established by

House Bill 2093 and set out in §18.73. The language in subsection (f) regarding child support suspensions is moved to §18.76. The administrative process for these types of suspensions are handled by the Office of the Attorney General. The department does not participate in the hearing process, therefore, separating this type of suspension action in its own section improves the understanding and eliminates confusion as to the department's role.

New §18.73, Administrative Proceedings, is added to provide the notice requirements for the new administrative hearing process. The language tracks Transportation Code, §643.2525 and clarifies the two types of notices mailed to the alleged violator.

New §18.74, Settlement Agreements, details the settlement agreement process. The department can enter into a compromise settlement agreement with an alleged violator any time before the issuance of a final order. This section states that the agreement shall include a clause that allows the department the authority to revoke the agreement if the alleged violator fails to abide by the terms of the agreement. This provision will ensure that the department continues to have authority to enforce future compliance.

New §18.75, Implications for Nonpayment of Penalties, is added to provide the implications for nonpayment of any penalty imposed against a violator. Under the current process the department did not have authority to take additional administrative action if the motor carrier failed to pay the imposed penalties. House Bill 2093 amended Transportation Code, §643.2525(k) to authorize the department to initiate a new administrative action to suspend, revoke, or deny motor carrier registration if the motor carrier fails to pay the penalty or any assessed costs before the 61st day after the day the decision becomes final. This section is amended to comply with the new provisions.

New §18.76, Registration Suspension Ordered under Family Code, includes the substance formerly contained in §18.73(f) regarding motor carrier registration suspensions due to orders issued under Family Code, Chapter 232, relating to payment of child support or possession of or access to a child. The department may suspend registration under this section without following the administrative process under §18.73 of this chapter. The Office of the Attorney General oversees the administrative hearing process for these types of violation. A suspension under this section may be lifted only on receipt of an order under Family Code, §232.013. This section complies with the requirements of Family Code, Chapter 232.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new sections as proposed are in effect, there are no fiscal implications for state or local governments as a result of enforcing or administering the amendments and new sections.

Carol Davis, Director, Motor Carrier Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new sections.

PUBLIC BENEFIT

Ms. Davis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new sections will be the implementation of current legislation, a more streamlined administrative process that will allow for greater enforcement of registration requirements, and increased protection to the traveling public and the transportation infrastructure. There are no anticipated economic costs for persons required to comply with the sections as proposed. These rules provide for additional enforcement authority but they do not increase the range of penalties assessed to violators. If all motor carriers comply with the provisions of the statute and the rules there will be no penalties assessed under these rules. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §18.1, §18.2, §18.10, §18.11, §18.13, §18.14, §18.16, new §18.18, amendments to §18.19, §18.31, §18.32, §18.70, §18.71, §18.72, and new §18.73, §18.74, §18.75, and §18.76 may be submitted to Carol Davis, Director, Motor Carrier Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 28, 2008.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §18.1, §18.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §643.003, which authorizes the commission to adopt rules to administer Transportation Code, Chapter 643 regarding motor carrier registration and Transportation Code, §645.003 which requires the commission to adopt rules to administer Transportation Code, Chapter 645 regarding the single state or the unified carrier registration systems.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643, Transportation Code, Chapter 645, and 49 U.S.C. §14504a.

§18.1. Purpose.

Transportation Code, Chapters 643, 645, and 646 [~~and Occupations Code, Chapter 2303,~~] require the department to regulate motor carriers, leasing businesses, as defined in §18.2 of this subchapter, and motor transportation brokers[~~, and vehicle storage facilities,~~] in order to protect the welfare of the public and ensure fair treatment of consumers by household goods carriers. The sections under this chapter prescribe the policies and procedures for the regulation of motor carriers, leasing businesses, and transportation brokers[~~, and vehicle storage facilities~~] by providing for insurance limits, the issuance of motor carrier credentials, [~~the licensing of vehicle storage facilities, the filing of nonconsent towing fees schedules,~~] the filing of performance bonds for transportation brokers, audit and record keeping functions, and enforcement.

§18.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (5) (No change.)

(6) Commercial motor vehicle--

(A) Includes:

(i) any motor vehicle or combination of vehicles with a gross weight, registered weight, or gross weight rating in excess

of 26,000 pounds, that is designed or used for the transportation of cargo in furtherance of any commercial enterprise;

[(ii) ~~all tow trucks, regardless of the gross weight rating of the tow truck;~~]

(ii) [~~(iii)~~] any vehicle, including buses, designed or used to transport more than 15 passengers, including the driver;

(iii) [~~(iv)~~] any vehicle used in the transportation of hazardous materials in a quantity requiring placarding under the regulations issued under the federal Hazardous Materials Transportation Act (49 U.S.C. [~~USC~~] §§5101-5127);

(iv) [~~(v)~~] a commercial motor vehicle, as defined by 49 C.F.R. [~~CFR~~] §390.5, owned or controlled by a person or entity that is domiciled in or a citizen of a country other than the United States; and

(v) [~~(vi)~~] any vehicle transporting household goods for compensation, regardless of the gross weight rating, registered weight or gross weight.

(B) Does not include:

(i) - (v) (No change.)

(vi) a motor vehicle registered under the Single State Registration System established under 49 U.S.C. [~~USC~~] §14504 when operating exclusively in interstate or international commerce; [~~and~~]

(vii) a vehicle operated by a governmental entity; [~~.~~]

(viii) a motor vehicle exempt from registration by the Unified Carrier Registration Act of 2005; and

(ix) a tow truck, as defined by Occupations Code, §2308.002 and permitted under Occupations Code, Chapter 2308, Subchapter C.

(7) - (8) (No change.)

[~~(9) Consent tow--Any tow of a motor vehicle initiated by the owner or operator of the vehicle or by a person who has possession, custody, or control of the vehicle. The term does not include a tow of a motor vehicle initiated by a peace officer investigating a traffic accident or a traffic incident that involves the vehicle.~~]

(9) [~~(10)~~] Conspicuous--Written in a size, color, and contrast so as to be readily noticed and understood.

(10) [~~(11)~~] Conversion--A change in an entity's organization that is implemented with a Certificate of Conversion issued by the Texas Secretary of State under Texas Business Corporation Act, Article 5.18.

(11) [~~(12)~~] Department--Texas Department of Transportation.

(12) [~~(13)~~] Director--The director of the Motor Carrier Division, Texas Department of Transportation.

(13) [~~(14)~~] Division--The Motor Carrier Division.

(14) [~~(15)~~] DOI--Texas Department of Insurance.

(15) [~~(16)~~] Estimate--An informal oral calculation of the approximate price of transporting household goods.

(16) [~~(17)~~] Farmer--A person who operates a farm or is directly involved in cultivating land or in raising crops or livestock that are owned by or are under the direct control of that person.

(17) [~~(18)~~] Farm vehicle--Any vehicle or combination of vehicles controlled or operated by a farmer or rancher being used to transport agriculture products, farm machinery, and farm supplies to or from a farm or ranch.

(18) [~~(19)~~] Gross weight rating--The maximum loaded weight of any combination of truck, tractor, and trailer equipment as specified by the manufacturer of the equipment. If the manufacturer's rating is unknown, the gross weight rating is the greater of:

(A) the actual weight of the equipment and its lading; or

(B) the maximum lawful weight of the equipment and its lading.

(19) [~~(20)~~] Household goods--Personal property intended ultimately to be used in a dwelling when the transportation of that property is arranged and paid for by the householder or the householder's representative. The term does not include personal property to be used in a dwelling when the property is transported from a manufacturing, retail, or similar company to a dwelling if the transportation is arranged by a manufacturing, retail, or similar company.

(20) [~~(21)~~] Household goods agent--A motor carrier who transports household goods on behalf of another motor carrier.

(21) [~~(22)~~] Household goods carrier--A motor carrier who transports household goods for compensation or hire in furtherance of a commercial enterprise.

(22) [~~(23)~~] Insurer--A person, including a surety, authorized in this state to write lines of insurance coverage required by Subchapter B and Subchapter G of this chapter.

(23) [~~(24)~~] Inventory--A list of the items in a household goods shipment and the condition of the items.

(24) [~~(25)~~] Leasing business--A person that leases vehicles requiring registration under Subchapter B of this chapter to a motor carrier that must be registered.

(25) [~~(26)~~] Manager--The manager of the department's Motor Carrier Division, Motor Carrier Operations Section.

(26) [~~(27)~~] Mediation--A non-adversarial form of alternative dispute resolution in which an impartial person, the mediator, facilitates communication between two parties to promote reconciliation, settlement, or understanding.

(27) [~~(28)~~] Motor Carrier or carrier--A person that controls, operates, or directs the operation of one or more vehicles that transport persons or cargo over a public highway in this state.

(28) [~~(29)~~] Motor transportation broker--A person who sells, offers for sale, or negotiates for the transportation of cargo by a motor carrier operated by another person or a person who aids and abets another person in selling, offering for sale, or negotiating for the transportation of cargo by a motor carrier operated by another person.

(29) [~~(30)~~] Moving services contract--A contract between a household goods carrier and shipper, such as a bill of lading, receipt, order for service, or work order, that sets out the terms of the services to be provided.

(30) [~~(31)~~] Multiple user--An individual or business who has a contract with a household goods carrier and who used the carrier's services more than 50 times within the preceding 12 months.

[~~(32) Nonconsent tow--Any tow of a motor vehicle that is not a consent tow.~~]

(31) [~~(33)~~] Not-to-exceed proposal--A formal written offer stating the maximum price a shipper can be required to pay for the transportation of specified household goods and any related services.

The offer may also state the non-binding approximate price. Any offer based on hourly rates must state the maximum number of hours required for the transportation and related services unless there is an acknowledgment from the shipper that the number of hours is not necessary.

(32) [~~(34)~~] Principal place of business--A single location that serves as a motor carrier's headquarters and where it maintains its operational records or can make them available.

(33) [~~(35)~~] Public highway--Any publicly owned and maintained street, road, or highway in this state.

(34) [~~(36)~~] Reasonable dispatch--The performance of transportation, other than transportation provided under guaranteed service dates, during the period of time agreed on by the carrier and the shipper and shown on the shipment documentation. This definition does not affect the availability to the carrier of the defense of force majeure.

(35) [~~(37)~~] Registration receipt--A receipt issued to the registrant by its registration state after the requirements of 49 C.F.R. [~~CFR~~] Part 367 have been met.

(36) [~~(38)~~] Registration state--A state where the registrant maintains a valid single state registration as defined in 49 C.F.R. [~~CFR~~] Part 367.

(37) [~~(39)~~] Replacement vehicle--A vehicle that takes the place of another vehicle that has been removed from service.

(38) [~~(40)~~] Revocation--The withdrawal of registration and privileges by the department or a registration state.

(39) [~~(41)~~] Shipper--The owner of household goods or the owner's representative.

(40) [~~(42)~~] Short-term lease--A lease of 30 days or less.

(41) [~~(43)~~] Single state registration system--The program established by 49 U.S.C. [~~USC~~] §14504.

(42) [~~(44)~~] SOAH--The State Office of Administrative Hearings.

(43) [~~(45)~~] State of travel--A state in which a motor carrier operates motor vehicles subject to the single state registration system.

(44) [~~(46)~~] Substitute vehicle--A vehicle that is leased from a leasing business and that is used as a temporary replacement for a vehicle that has been taken out of service for maintenance, repair, or any other reason causing the temporary unavailability of the permanent vehicle.

(45) [~~(47)~~] Suspension--Temporary removal of privileges granted to a registrant by the department or a registration state.

(46) Unified carrier registration system--A motor vehicle registration system established under 49 U.S.C. §14504a or a successor federal registration program.

[~~(48) Towing company--A motor carrier that transports vehicles using a tow truck.~~]

[~~(49) Tow--The utilization of a mechanical device used to winch or otherwise move another vehicle.~~]

[~~(50) Tow truck--A motor vehicle equipped with or used in combination with a mechanical device used to tow, winch, or otherwise move another vehicle. The following motor vehicles are not considered tow trucks:~~]

[~~(A) a motor vehicle owned and used exclusively by a governmental entity, including a public school district;~~]

[~~(B) a motor vehicle towing:~~]

[~~(i)~~ ~~a race car;~~]

[~~(ii)~~ ~~a motor vehicle for exhibition; or~~]

[~~(iii)~~ ~~an antique motor vehicle;~~]

[~~(C) a recreational vehicle towing another vehicle;~~]

[~~(D) a motor vehicle used in combination with a tow bar, tow dolly, or other mechanical device if the vehicle is not operated in the furtherance of a commercial enterprise; or~~]

[~~(E) a motor vehicle that is controlled or operated by a farmer or rancher and that is used for towing a farm vehicle.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706360
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER B. MOTOR CARRIER REGISTRATION

43 TAC §§18.10, 18.11, 18.13, 18.14, 18.16, 18.18, 18.19

STATUTORY AUTHORITY

The amendments and new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §643.003, which authorizes the commission to adopt rules to administer Transportation Code, Chapter 643 regarding motor carrier registration and Transportation Code, §645.003 which requires the commission to adopt rules to administer Transportation Code, Chapter 645 regarding the single state or the unified carrier registration systems.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643, Transportation Code, Chapter 645, and 49 U.S.C. §14504a.

§18.10. Purpose.

Transportation Code, Chapter 643, provides that a motor carrier may not operate a commercial motor vehicle [~~or a tow truck~~] or transport household goods on a for-hire basis on a road or highway of this state unless the carrier registers with the department or is exempt from registration under Transportation Code, §643.002. This subchapter prescribes the procedures by which a motor carrier, leasing business, or for-hire transporter of household goods may register, sets out minimum insurance requirements and minimum workers' compensation or accident insurance requirements, and prescribes procedures for registering as a motor carrier under the single state registration system.

§18.11. Motor Carrier Registration.

(a) A motor carrier may not operate a commercial motor vehicle [~~or tow truck~~] upon the public streets and highways of this state without first obtaining a certificate of registration issued by the department as prescribed in this subchapter.

(b) (No change.)

§18.13. Application for Motor Carrier Registration.

(a) Form of application. An application for motor carrier registration must be filed with the department's Motor Carrier Division and must be in the form prescribed by the director and must contain, at a minimum, the following information.

(1) - (5) (No change.)

(6) Type of motor carrier operations. An applicant must state if the applicant:

(A) proposes to transport passengers, household goods, or hazardous materials; or

[~~(B) is a tow truck company that performs nonconsent tows; or~~]

(B) [~~(C)~~] is domiciled in a foreign country.

(7) - (8) (No change.)

(9) Drug-testing certification. Each motor carrier must certify, as part of the application, that the motor carrier is in compliance with the drug-testing requirements of 49 C.F.R. Part 382.

(A) (No change.)

(B) Report of positive result. A motor carrier required to register under this section shall report to the Department of Public Safety, in the manner required by the Department of Public Safety, a valid positive result on a controlled substances test performed as part of the carrier's drug testing program on an employee of the carrier who holds a commercial driver's license under Transportation Code, Chapter 522. The term "employee" as used in this subparagraph includes all employees as defined in 49 C.F.R. [~~CFR~~] §40.3.

(10) (No change.)

(11) Additional requirements. The following fees and information must be submitted with all applications.

(A) (No change.)

(B) An application must be accompanied by a vehicle registration fee of:

(i) $10 for each vehicle[~~, other than a tow truck, requiring registration or $25 for each tow truck~~] that the motor carrier proposes to operate under a seven day, 90 day, or annual registration; or

(ii) $20 for each vehicle[~~, other than a tow truck, requiring registration or $50 for each tow truck~~] that the motor carrier proposes to operate under a biennial registration.

(C) - (D) (No change.)

(12) (No change.)

(b) - (c) (No change.)

(d) Disposition of application.

(1) - (2) (No change.)

(e) Additional and Replacement Vehicles. A motor carrier required to obtain a certificate of registration under this section shall not operate additional vehicles unless the carrier identifies the vehicles on a form prescribed by the director and pays applicable fees as described in this subsection.

(1) Additional vehicles. To add a vehicle, a motor carrier must pay a fee of $10 for each additional vehicle[~~, other than a tow truck, or $25 for each tow truck~~] that the motor carrier proposes to operate under a seven day, 90 day, or annual registration. To add a vehicle during the first year of a biennial registration, a motor carrier must pay a fee of $20 for each vehicle[~~, other than a tow truck, or $50 for each tow truck~~]. To add a vehicle during the second year of a biennial registration, a motor carrier must pay a fee of $10 for each vehicle[~~, other than a tow truck, or $25 for each tow truck~~].

(2) - (3) (No change.)

(f) Supplement to original application. A motor carrier required to register under this section shall submit a supplemental application under the following circumstances.

(1) Change of cargo. A registered motor carrier may not begin transporting household goods or hazardous materials[~~, or performing nonconsent tows,~~] unless the carrier submits a supplemental application to the department and shows the department evidence of insurance or financial responsibility in the amounts specified by §18.16 of this subchapter.

(2) - (7) (No change.)

(g) - (i) (No change.)

§18.14. Expiration and Renewal of Commercial Motor Vehicle Registration.

(a) (No change.)

(b) Registration renewal.

(1) Approximately 60 days before the expiration of registration, the department will mail or send electronically a renewal notice to each registered motor carrier with annual or biennial registration. The notice will be mailed to the carrier's last known address according to the division's records. Failure to receive the notice does not relieve the registrant of the responsibility to renew. A motor carrier must ensure that the department receives the renewal at least 15 days prior to the renewal date specified in subsection (a) of this section. A supplement to an application for motor carrier registration renewal must:

(A) (No change.)

(B) include a $10 fee for each vehicle[~~, other than a tow truck, requiring registration or $25 for each tow truck~~] that the carrier operates under an annual certificate of registration and a $20 fee for each vehicle[~~, other than a tow truck, requiring registration or $50 for each tow truck~~] that the carrier operates under a biennial certificate of registration; and

(C) (No change.)

(2) - (5) (No change.)

(c) Interstate motor carrier operating in intrastate commerce.

(1) An interstate motor carrier registered under §18.18 of this chapter is not required to renew a certificate of registration issued under §18.11 of this chapter except when the motor carrier is operating commercial motor vehicles as a

(A) charter bus carrier;

(B) for-hire household goods carrier; or

(C) recyclable materials or waste carrier.

(2) If a motor carrier that registered under §18.18 of this chapter does not maintain continuous motor carrier registration under

§18.11 of this chapter, the motor carrier must file an application under §18.13 of this chapter to operate on public streets and highways in this state.

§18.16. Insurance Requirements.

(a) Automobile liability insurance requirements. A motor carrier must file proof of commercial automobile liability insurance with the department on a form acceptable to the director for each vehicle required to be registered under this subchapter. The motor carrier must carry and maintain automobile liability insurance that is combined single limit liability for bodily injury to or death of an individual per occurrence, loss or damage to property (excluding cargo) per occurrence, or both. Extraneous information will not be considered acceptable, and the department may reject proof of commercial automobile liability insurance if it is provided in a format that includes information beyond what is required. Minimum insurance levels are indicated in the following table.

Figure: 43 TAC §18.16(a)

(b) Cargo insurance.

[~~(1)~~] Household goods carriers shall file and maintain with the department proof of financial responsibility.

(1) [~~(A)~~] The minimum limits of financial responsibility for a household goods carrier for hire is $5,000 for loss or damage to a single shipper's cargo carried on any one motor vehicle.

(2) [~~(B)~~] The minimum limits of financial responsibility for a household goods carrier for hire is $10,000 for aggregate loss or damage to multiple shipper cargo carried on any one motor vehicle. In cases in which multiple shippers sustain damage and the aggregate amount of cargo damage is greater than the cargo insurance in force, the insurance company shall prorate the benefits among the shippers in relationship to the damage incurred by each shipper.

[~~(2) Tow truck company performing nonconsent tows. A tow truck company that performs nonconsent tows shall file and maintain with the department proof of financial responsibility for on-hook cargo. The minimum level of financial responsibility for each registered vehicle performing nonconsent tows will be in the amount of at least $50,000.~~]

(c) - (d) (No change.)

(e) Filing proof of insurance with the department.

(1) Forms.

(A) - (B) (No change.)

[~~(C) A tow truck company that performs nonconsent tows shall file and maintain with the department proof of on-hook cargo insurance for all nonconsent tows. This proof shall be on a form acceptable to the director.~~]

(2) - (4) (No change.)

(f) - (i) (No change.)

§18.18. Unified Carrier Registration System.

(a) The State of Texas, through the department, shall participate in the federal motor carrier registration program under the Unified Carrier Registration system as defined in §18.2(46) of this chapter.

(b) An interstate carrier operating in Texas must register and comply with provisions of the Unified Carrier Registration System as required by 49 U.S.C. 14504(a).

§18.19. Short-term Lease and Substitute Vehicles.

(a) Registration. A short-term lease vehicle registered under this section is exempt from the registration requirements described in §18.13 of this subchapter while leased to a registered motor carrier.

(1) - (2) (No change.)

(3) Fees. An annual registration fee of $10 per vehicle [~~other than a tow truck, or $25 for each tow truck~~] operated must be paid at the time the report is filed under paragraph (2) of this subsection.

(4) (No change.)

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706361
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER C. RECORDS AND INSPECTIONS

43 TAC §18.31, §18.32

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §643.003, which authorizes the commission to adopt rules to administer Transportation Code, Chapter 643 regarding motor carrier registration and Transportation Code, §645.003 which requires the commission to adopt rules to administer Transportation Code, Chapter 645 regarding the single state or the unified carrier registration systems.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643, Transportation Code, Chapter 645, and 49 U.S.C. §14504a.

§18.31. Investigations and Inspections of Motor Carrier Records.

(a) (No change.)

(b) Inspections.

(1) A motor carrier shall admit a certified inspector access to the carrier's premises to conduct inspections or investigations of alleged violations of this chapter, Transportation Code, Chapters [~~Chapter~~] 643 and 645 [~~, Subchapters B, C, D, and E~~]. The motor carrier shall provide adequate work space with reasonable working conditions, and allow the certified inspector to copy and verify records and documents required to be maintained by the carrier under §18.32 of this subchapter.

(2) - (3) (No change.)

(c) (No change.)

(d) Designation of meeting time. If the motor carrier's normal business hours do not provide the access necessary for the investigator to conduct the investigation and the parties cannot reach an agreement as to a time to meet to access the records, the department shall designate the time of the meeting by certified mail or facsimile.

§18.32. Motor Carrier Records.

(a) General records to be maintained. Every motor carrier shall prepare and maintain at its principal place of business in Texas:

(1) operational logs, insurance certificates, [~~and~~] documents to verify the carrier's operations, and proof of registration fee payments;

(2) complete and accurate records of services performed;

(3) all certificate of title documents, weight tickets, permits for oversize or overweight vehicles and loads, dispatch records, [~~tow tickets,~~] or any other document that would verify the operations of the vehicle to determine the actual weight, insurance coverage, size, and/or capacity of the vehicle; and

[~~(4) documents supporting fee payments and the original registration receipts issued by the department for an interstate carrier registered under §18.17 of this chapter (relating to Single State Registration System), for a period of at least three years; and~~]

(4) [~~(5)~~] the original certificate of registration and registration listing, if applicable.

(b) - (c) (No change.)

(d) Location of files. Except as provided in paragraphs (1) and (2) of this subsection, every motor carrier shall maintain at a principal office in Texas all records and information required by the department.

(1) - (2) (No change.)

[~~(3) A motor carrier that performs nonconsent tows shall maintain a current towing fee schedule, as prescribed in Subchapter H of this chapter (relating to Nonconsent Towing Fees Schedule), at all vehicle storage facilities where vehicles are delivered.~~]

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 27, 2008
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SUBCHAPTER F. ENFORCEMENT

43 TAC §§18.70 - 18.76

STATUTORY AUTHORITY

The amendments and new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §643.003, which authorizes the commission to adopt rules to administer Transportation Code, Chapter 643 regarding motor carrier registration and Transportation Code, §645.003 which requires the commission to adopt rules to administer Transportation Code, Chapter 645 regarding the single state or the unified carrier registration systems.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 643, Transportation Code, Chapter 645, and 49 U.S.C. §14504a.

§18.70. Purpose.

The purpose of this subchapter is to provide for an efficient and effective system of enforcement of Transportation Code, Chapters 643, 645, and 648, by setting out procedures for administrative penalties, the suspension [~~and~~] revocation and denial of motor carrier registration and leasing business registration, and probation of the suspension of a motor carrier's certificate of registration.

§18.71. Administrative Penalties.

[~~(a) Definition. For purposes of this section, the term "director" shall mean the executive director of the department or the executive director's designee not below the rank of division or office director.~~]

(a) [~~(b)~~] Authority. The department may impose an administrative penalty against a motor carrier required to register under this section if the motor carrier violates a provision of Transportation Code, Chapter 643 or [~~, Subchapters A, B, C, D, and E,~~] Transportation Code, Chapter 645 [~~,~~] or violates a rule or order adopted under Chapter 643 or 645 [~~a provision of Subchapters B, C, E, or H of this chapter (relating to Motor Carrier Registration, Records and Inspections, Consumer Protection, and Nonconsent Towing Fees Schedule)~~].

(b) [~~(c)~~] Amount of penalty.

(1) The penalty for each violation may be in an amount not to exceed $5,000.

(2) If it is found that the motor carrier knowingly committed a violation, the penalty for that violation may be in an amount not to exceed $15,000. A person acts knowingly if that person has acted with knowledge that [~~such~~] acts [~~constitute or~~] are in violation of Transportation Code, Chapter 643, [~~Subchapters A, B, C, D, and E,~~] Transportation Code, Chapter 645, or a rule or order adopted under Transportation Code, Chapter 643 or 645 [~~a provision of Subchapters B, C, E, or H of this chapter (relating to Motor Carrier Registration, Records and Inspections, Consumer Protection, and Nonconsent Towing Fees Schedule)~~].

(3) If it is found that the motor carrier knowingly committed multiple violations, the aggregate penalty for the multiple violations may be in an amount not to exceed $30,000. Multiple violations are all violations arising during a single episode pursuant to one scheme or course of conduct.

(4) Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

[~~(d) Initiation of proceedings.~~]

[~~(1) Investigation. If an authorized investigator of the department determines that a violation has occurred, the investigator will issue a summary to the manager. The manager shall issue a report to the director stating the facts on which the investigator based his or her determination, and a recommendation on the imposition and amount of the penalty.~~]

(5) [~~(2) Amount of penalty.~~] Any recommendation that a penalty should be imposed must be based on the following factors:

(A) the seriousness of the violation; including the nature, circumstances, extent and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety or economic welfare of the public;

(B) the economic harm to property or the environment caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

[(3) Notice of report. Within 14 days of the date the report was issued to the director, the department will mail, by certified mail, written notice of the report to the motor carrier. The notice will include:]

[(A) a brief summary of the alleged violation(s);]

[(B) a statement of the amount of the recommended penalty;]

[(C) a statement of the right of the motor carrier to an informal hearing in accordance with paragraph (4) of this subsection; and]

[(D) a statement of the right of the motor carrier to request an administrative hearing concerning the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.]

[(4) Motor carrier response. Not later than the 20th day after the date on which a written notice of violation is received by the motor carrier, the motor carrier may:]

[(A) accept in writing the determination and recommended penalty;]

[(B) submit a written request for an administrative hearing concerning the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty; or]

[(C) submit a written request for an informal hearing under subsection (e) of this section.]

[(e) Informal hearing.]

[(1) Request. If requested in writing by the motor carrier within 20 days of the date of the notice issued under subsection (d)(3) of this section, the department will hold an informal hearing to discuss a sanction recommended under this section. Such hearing will be scheduled and conducted by the manager.]

[(2) Procedure. An informal hearing shall not be subject to rules of evidence and civil procedure except to the extent necessary for the orderly conduct of the hearing. The department will summarize the nature of the violation and the penalty, and discuss the factual basis for such. The motor carrier will be afforded an opportunity to respond to the allegations verbally and/or in writing.]

[(3) Resolution. In the event matters are resolved in the motor carrier's favor, the manager will send that carrier written notification that the proposed sanction is withdrawn.]

[(4) Modified sanction. If matters are resolved resulting in a modified sanction, the manager may prepare a settlement agreement as provided by subsection (j) of this section.]

[(5) Failure to resolve. If matters are not resolved in the informal hearing, the department will initiate a formal enforcement action as provided by subsection (f) of this section.]

[(f) Administrative hearing.]

[(1) If the motor carrier requests a hearing or fails to respond in a timely manner to the notice, the department will initiate a contested case in accordance with §§1.21 et seq. of this title (relating to Procedures in Contested Cases). The department will provide written notice of such action to the motor carrier.]

[(2) A contested case under this subsection will be governed by §§1.21 et seq. of this title, subject to the following exceptions.]

[(A) Attorney's fees. If the administrative law judge finds that a violation has occurred, he or she shall, in addition to the proposed penalty, include in the proposal for decision a finding setting out costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state in bringing the proceeding. If, under subparagraph (B) of this paragraph, the director finds that a violation has occurred, the director shall adopt the finding and make it a part of the final order.]

[(B) Action of director. An administrative law judge's proposal for decision shall be submitted to the director, who may find that a violation has occurred and impose a penalty or may find that no violation has occurred. The director may increase or decrease the amount of the penalty recommended by the administrative law judge within the limits prescribed by subsection (c) of this section.]

[(g) Action of motor carrier.]

[(1) Within 30 days after the date the director's order becomes final as provided by §2001.144, Government Code, the motor carrier shall:]

[(A) pay the department the amount of the penalty;]

[(B) pay the department the amount of the penalty and file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty; or]

[(C) without paying the amount of the penalty, file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.]

[(2) Within the 30-day period, a motor carrier who acts under paragraph (1)(C) of this section may:]

[(A) stay enforcement of the penalty by:]

[(i) paying the amount of the penalty into the registry of the court for placement in an escrow account; or]

[(ii) providing to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the director's order is final; or]

[(B) request the court to stay enforcement of the penalty by:]

[(i) filing with the court a sworn affidavit of a representative of the carrier stating that the carrier is financially unable to pay the amount of the penalty and is financially unable to give the supersedeas bond; and]

[(ii) serving a copy of the affidavit on the director by certified mail.]

[(3) If the department receives a copy of an affidavit under paragraph (2)(B)(i) of this subsection, it may file with the court, within five days after the date the copy is received, a contest to the affidavit. The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. The motor carrier who files an affidavit has the burden of proving that the carrier is financially unable to pay the amount of the penalty and to give a supersedeas bond.]

[(h) Collection. If the motor carrier does not pay the amount of the penalty and the enforcement of the penalty is not stayed, the director may refer the matter to the attorney general for collection of the amount of the penalty.]

[(i) Judicial review. Judicial review of the order of the director is instituted by filing a petition as provided by Subchapter G, Chapter 2001, Government Code, and is under the substantial evidence rule, and shall proceed in accordance with Transportation Code, §643.251.]

[(j) Settlement agreements.]

[(1) At any time prior to the date on which a final order is issued by the director under subsection (f)(2)(B) of this section, the department and the alleged violator may agree to enter into a compromise settlement agreement. The agreement shall not constitute an admission by the motor carrier of any violation. The compromise settlement agreement shall be signed by the alleged violator and the director, and will reflect that the alleged violator consents to the assessment of a specific administrative penalty or other action by the department against the violator.]

[(2) Simultaneously with the filing of a compromise settlement agreement, the alleged violator shall remit a cashier's check or money order to the Texas Department of Transportation, payable to the "Comptroller of Public Accounts." These funds shall be held in an escrow account pending the issuance of a final order.]

[(3) Upon the issuance by the director of a final order, the administrative penalty proceeding shall cease.]

§18.72. Administrative Sanctions [Suspension and Revocation].

(a) Grounds for action. The department may suspend, revoke, or deny [place on probation a motor carrier whose certificate of registration has been suspended or suspend or revoke] a certificate of registration of a motor carrier or leasing business if the motor carrier or leasing business:

(1) fails to maintain insurance or proof of financial responsibility as required by §18.16 of this chapter;

(2) fails to keep proof of insurance in the cab of each vehicle as required by §18.16 of this chapter;

(3) fails to register a vehicle requiring registration under Subchapter B of this chapter; [or]

(4) violates any other provision of this chapter;

(5) violates any provision of Transportation Code 643;

(6) [(4)] knowingly provides false information on any form filed with the department under this chapter or Transportation Code, Chapter 643; or [.]

(7) violates an order adopted under this chapter or Transportation Code, Chapter 643.

(b) Department of Public Safety enforcement recommendations.

(1) The department may suspend or revoke a certificate of registration of a motor carrier upon a written request by the Department of Public Safety [may request that the department place on probation a motor carrier whose certificate of registration has been suspended or suspend or revoke a certificate of registration], if a motor carrier:

(A) has an unsatisfactory safety rating under 49 CFR, Part 385; or

(B) has multiple violations of Transportation Code, Chapter 644, a rule adopted under that chapter, or Transportation Code, Title 7, Subtitle C.

(2) A request [for probation, suspension, or revocation] under paragraph (1) of this subsection must [be submitted in writing by the executive director of the Department of Public Safety and must] include documentation showing [evidence of] the violation.

(c) Probation [Action without hearing]. [The division may place on probation a motor carrier whose certificate of registration has been suspended or suspend or revoke a certificate of registration without a hearing if:]

(1) The department may probate any suspension ordered under this section.

(2) In determining whether to probate a suspension, the department will review:

(A) the seriousness of the violation;

(B) prior violations by the motor carrier;

(C) whether the department has previously probated a suspension for the motor carrier;

(D) cooperation by the motor carrier in the investigation and enforcement proceeding; and

(E) the ability of the motor carrier to correct the violations.

(3) The department shall set the length of the probation based on the seriousness of the violation and previous violations by the motor carrier.

(4) The department will require that the motor carrier report monthly to the department any information necessary to determine compliance with the terms of the probation.

(5) The department may revoke the probation and order the initial suspension and administrative penalty if the motor carrier fails to abide by any terms of the probation.

[(1) the department provides notice to the motor carrier or leasing business of:]

[(A) the proposed probation, suspension, or revocation; and]

[(B) the right of the carrier or leasing business to request a hearing under Chapter 2001, Government Code; and]

[(2) the motor carrier or leasing business fails to file with the department a written request for an administrative hearing within ten days after the date the carrier or leasing business received the notice of probation, suspension, or revocation.]

[(d) Contested case. If the motor carrier or leasing business files a written request for an administrative hearing with the director, the department will initiate a contested case proceeding in accordance with §§1.21 et seq. of this title (relating to Procedures in Contested Cases).]

[(e) Failure to maintain insurance.]

[~~(1) Notice. On receipt of notice of cancellation of insurance coverage under §18.16(f) of this chapter, the department will provide written notice of proposed probation, suspension, and revocation as required by subsection (c) of this section.~~]

[~~(2) Sanction. If the motor carrier or leasing business does not file proof of insurance as required by §18.16 of this chapter before the cancellation of its existing insurance, the division will revoke the certificate of registration on the day of cancellation as described in §18.16 of this chapter.~~]

[~~(f) Suspension due to failure to comply with order issued under Family Code.~~]

[~~(1) On receipt of a final order suspending a license, issued under Family Code, §232.003 or §232.008, the department will suspend:~~]

[~~(A) a certificate of registration issued under Subchapter B of this chapter; or~~]

[~~(B) the registration of an interstate motor carrier issued under §18.17 of this chapter.~~]

[~~(2) The department will charge an administrative fee of $10 to a motor carrier, leasing business, or interstate motor carrier that is the subject of an order suspending a license.~~]

[~~(g) Terms of probation. If a motor carrier is placed on probation, the department may require the motor carrier to report regularly to the department on any matter that is related to the probation.~~]

§18.73. Administrative Proceedings.

(a) If the department decides to take an enforcement action under §18.71 or §18.72 of this subchapter, the department shall give written notice to the motor carrier by first class mail to the carrier's address as shown in the records of the department.

(b) The notice required by subsection (a) of this section must include:

(1) a brief summary of the alleged violation;

(2) a statement of each sanction;

(3) the effective date of each sanction;

(4) a statement informing the carrier of the carrier's right to request a hearing;

(5) a statement as to the procedure for requesting a hearing, including the period during which a request must be made; and

(6) a statement that the proposed penalties and sanctions will take effect on the date specified in the letter if the motor carrier fails to request a hearing.

(c) The motor carrier must submit a written request for a hearing to the address provided in the notice not later than the 26th day after the date the notice is mailed.

(d) On receipt of the written request for a hearing the department will refer the matter to the State Office of Administrative Hearings. When the hearing is set, the department will give notice of the time and place of the hearing to the carrier.

(e) If the motor carrier does not make a written request for a hearing or enter into a settlement agreement under §18.74 of this subchapter before the 27th day after the date the notice is mailed, the department's decision becomes final and unappealable.

§18.74. Settlement Agreements.

(a) The department and the alleged violator may enter into a compromise settlement agreement at any time before the issuance of a final decision. The compromise settlement agreement must provide that the alleged violator consents to the assessment of a specified administrative penalty or to other specified action by the department against the violator and must be signed by the alleged violator and the director. A compromise agreement is not an admission of the alleged violation.

(b) If the settlement agreement requires the payment of a penalty to the department, the alleged violator must submit a cashier's check or money order to the department in the agreed amount before the agreement may be executed.

(c) Upon the execution by the director of a settlement agreement, the administrative proceeding ends. The settlement is a department order that is final and unappealable.

(d) The settlement agreement must include a clause that allows the department the authority to revoke the settlement agreement and initiate a hearing on the original alleged violations if the alleged violator fails to abide by the terms of the settlement agreement.

§18.75. Implications for Nonpayment of Penalties.

(a) If a motor carrier fails to pay any penalty imposed or cost assessed before the 61st day after the day the order imposing the penalty or assessing the cost becomes final, the department may initiate a new administrative action to revoke, suspend, or deny the motor carrier's certificate of registration.

(b) If a motor carrier's registration is revoked or suspended by an administrative action under this chapter, the motor carrier is not eligible for a reinstatement or renewal of a registration under Subchapter B of this chapter until all required penalties, costs, fees, or expenses have been paid to the department.

(c) If a motor carrier is denied registration under this chapter, the motor carrier is not eligible to register or renew the motor carrier registration under Subchapter B of this chapter until all required penalties, costs, fees, or expenses have been paid to the department.

§18.76. Registration Suspension Ordered under Family Code.

(a) On receipt of a final order issued under Family Code, §232.003, §232.008, or §232.009, regarding child support enforcement, the department will suspend:

(1) a certificate of registration issued under Subchapter B of this chapter; or

(2) the registration of an interstate motor carrier issued under §18.17 or §18.18 of this chapter.

(b) The department will charge an administrative fee of $10 to a person whose registration is suspended under this section.

(c) A suspension under this section does not require the department to give notice or otherwise follow the administrative process provided under §18.73 of this subchapter.

(d) A registration suspended under this section may only be reinstated on receipt of an order issued under Family Code, §232.013.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706363

Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 27, 2008
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 53. MARKET REGULATION

4 TAC §53.5

Proposed amended §53.5, published in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3092), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706318

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 26. POLITICAL AND LEGISLATIVE ADVERTISING

1 TAC §26.2

The Texas Ethics Commission (the Commission) adopts new §26.2, relating to the publication of a newsletter of a public officer of a political subdivision. The new rule is adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8069) and will not be republished.

Under §26.2, a determination as to whether a newsletter covered by §255.003 of the Election Code constitutes political advertising may be made only when the newsletter is viewed as a whole and in proper context. The rule provides guidance without setting a comprehensive standard.

The Commission received a written comment and oral comments from Bennett Sandlin on behalf of Texas Municipal League (TML). Mr. Sandlin stated that TML believes the rule is unnecessary with respect to elections on measures because the applicable statute, §255.003 of the Election Code, already includes a simple test. Mr. Sandlin further states that the rule creates a bright line test that could have unintended consequences. The Commission considers comments from all parties, but was satisfied with the rule as proposed. No change was made as a result of these comments.

The new section is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the Commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706357
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: January 3, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 463-5800

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CHAPTER 34. REGULATION OF LOBBYISTS

The Texas Ethics Commission adopts the repeal of §§34.19, 34.61, and 34.62 and the amendment to §34.43. These rules relate to lobbyists representation of lobby clients, lobby registration fees, and lobby registration requirements. The rules are adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8069) and will not be republished.

The repeal of §34.19 reflects the change made by the legislature in 2005 when the statutory provision referenced in this rule (Government Code, §305.0011) was repealed.

The repeal of §34.61 repeals the rule relating to the lobby registration fee for exempt registrants. This rule is mirrored in Government Code, §305.0059(c)(1) and is therefore not necessary.

The repeal of §34.62 repeals the rule relating to the temporary increase in lobby registration fees. This rule is unnecessary because the rule expired in January 1, 2005.

The amendment to §34.43 tracks the change made by H.B. 2489, 80th Legislature, Regular Session. The new law clarifies that compensation that a person is "entitled to receive under an agreement under which the person is retained or employed" counts toward the compensation threshold triggering the requirement to register as a lobbyist.

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §34.19

The repeal of §34.19 is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706374
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: January 3, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 463-5800

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SUBCHAPTER B. REGISTRATION REQUIRED

1 TAC §34.43

The amendment to §34.43 is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706376
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: January 3, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 463-5800

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SUBCHAPTER C. COMPLETING THE REGISTRATION FORM

1 TAC §34.61, §34.62

The repeal of §34.61 and §34.62 is adopted under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706375
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: January 3, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 463-5800

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CHAPTER 50. LEGISLATIVE SALARIES AND PER DIEM

1 TAC §50.1

The Texas Ethics Commission adopts an amendment to §50.1, to set the legislative per diem as required by the Texas Constitution, Article III, §24a. The amendment is adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8069) and will not be republished.

Section 50.1 sets the per diem for members of the legislature and the lieutenant governor at $151 for each day during the regular session and any special session.

No comments were received regarding the proposed rule during the comment period.

This amendment is adopted under the Texas Constitution, Article III, §24a, and the Government Code, Chapter 571, §571.062.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706344
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: January 1, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 463-5800

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.7101, Cost Reporting, and adopts the repeal of §355.7105, Definition of Allowable and Unallowable Costs; §355.7107, Allowable Costs; §355.7109, Unallowable Costs; and §355.7111, Costs Not Included in Recommended Payment Rates, without changes to the proposed text as published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6924) and will not be republished.

The amended §355.7101 clarifies that Subchapter H (Reimbursement Methodology for 24-Hour Child Care Facilities) applies only to the calculation of prospective daily unit rates paid by the Department of Family and Protective Services (DFPS) for 24-Hour Residential Child Care. The amended rule also clarifies the definitions of allowable and unallowable costs for cost reporting purposes, the reporting of related-party transactions, limits to be applied to certain related-party salary costs for cost reporting and rate determination purposes, and cost report training requirements. The purpose of the amendment is to clarify that related-party allowable cost rules apply only to cost reporting and unit rate determination. The amendment also is intended to enhance consistency with cost reporting rules applicable to other programs required to complete cost reports for HHSC.

The 30-day comment period ended November 5, 2007, and HHSC did not receive any comments on the proposed amendment to §355.7101 or the proposed repeal of §§355.7105, 355.7107, 355.7109, or 355.7111.

SUBCHAPTER H. REIMBURSEMENT METHODOLOGY FOR 24-HOUR CHILD CARE FACILITIES

1 TAC §355.7101

The amendment is adopted under Texas Government Code §531.033, which authorizes the executive commissioner of

HHSC to adopt rules necessary to carry out the Commission's duties; Texas Government Code §531.055, which authorizes the executive commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency; and the Human Resources Code, §40.004(c) and (d), which authorize the executive commissioner to consider fully all written and oral submissions to the DFPS Council about a proposed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706319
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 1, 2008
Proposal publication date: October 5, 2007
For further information, please call: (512) 424-6900

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1 TAC §§355.7105, 355.7107, 355.7109, 355.7111

The repeals are adopted under Texas Government Code §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the Commission's duties; Texas Government Code §531.055, which authorizes the executive commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency; and the Human Resources Code, §40.004(c) and (d), which authorize the executive commissioner to consider fully all written and oral submissions to the DFPS Council about a proposed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706320
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 1, 2008
Proposal publication date: October 5, 2007
For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 3. STATE BANK REGULATION

SUBCHAPTER B. GENERAL

7 TAC §3.37

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §3.37, concerning the calculation of annual assessment for banks, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7795). The text will not be republished.

Under Finance Code, §31.106, each bank must pay fees to the department for the cost of examination, the equitable or proportionate cost of maintenance and operation of the department, and the cost of enforcement. Pursuant to Finance Code, §31.003(a)(4), fees set by rule must be ratable and equitable.

Examination fees for state banks are set forth in §3.36 and §3.37. As these sections demonstrate, the department utilizes a tiered, assessment-based fee for supervision and examination of banks, collected in quarterly installments. The assessment system closely tailors the cost of supervision and examination to each bank based on factors such as size, financial condition, and frequency of examinations.

Section 3.37 specifies the calculation methodology for assessments. A state bank's annual assessment is calculated using three factors: (1) a base assessment amount provided for the assessable asset group to which a bank belongs, plus (2) an additional amount determined by applying a declining marginal assessment factor to assets in excess of the floor of the relevant assessable asset group, as modified by (3) the applicable examination frequency.

Prior to amendment, the assessment table in §3.37 divided banks into 10 asset size groups or categories, the largest of which applied to banks with assessable assets of $10 billion or more. Prior to 2006, no state bank had assessable assets of $10 billion, and until recently only one state bank exceeded $10 billion in assessable assets. However, the department recently issued the charter for a new state bank that is several times larger than the previously largest state bank. Because the department by statute must limit its fees to an amount sufficient to fund its operations (i.e., is self-funded and self-leveling), the adopted amendment modifies the §3.37 table to create additional asset size categories with declining marginal assessment factors to more equitably reflect the anticipated cost of supervising and examining larger banks.

The amendments cap the $10 billion assessable asset group in the §3.37 table at $20 billion and add four additional groups, for assessable assets of $20-40 billion, $40-60 billion, $60-80 billion, and $80 billion or greater.

In addition, the amendments eliminate minor mathematical inconsistencies in the previous base assessment amounts. By design, the base assessment amount is cumulative, with each successive asset group incurring the same assessments payable by smaller assessment groups plus additional amounts calculated at the specified marginal rate. Due to a previously undiscovered error, the previous base assessments for each group did not accurately carry over from the next smaller group, although the differences were quite small. Under the adopted amendments, the applicable base assessment declines by approximately $10 for the first three groups, $5 for the next three groups, $65 for the seventh group, and $365 for the next two groups.

With respect to the group with assessable assets of $10 billion and over, the required mathematical correction would have re-

sulted in an increase of $885 in the base assessment. To mitigate this small increase, the marginal assessment factor for this group is reduced from 0.048 to 0.047. Based on bank asset data as of March 31, 2007, the maximum annual assessment of the only bank in this group will decline by $432.

The department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Finance Code, §31.003(a)(4) and §31.106, which authorize the commission to adopt rules necessary or reasonable to recover the cost of supervision and regulation by imposing and collecting ratable and equitable fees. Assessment amounts are established by the commission and not mandated by the legislature.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706380
A. Kaylene Ray
General Counsel
Finance Commission of Texas
Effective date: January 3, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 475-1300

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PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 35. CHECK VERIFICATION ENTITIES

The Finance Commission of Texas (the "commission") adopts new Chapter 35, §§35.1, 35.11 - 35.17, 35.31, 35.51 - 35.59, 35.71, and 35.72, concerning check verification entities. Sections 35.1, 35.11, 35.13, 35.53, and 35.57 are adopted with changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7797). Sections 35.12, 35.14 - 35.17, 35.31, 35.51, 35.52, 35.54 - 35.56, 35.58, 35.59, 35.71 and 35.72 are adopted without changes and will not be republished.

The adopted change made to §35.11(1) is in response to public comment received and is described in the summary of comments and in the responses section of this preamble. Other nonsubstantive clerical changes in the proposed text are found in §§35.13(a)(2)(A), 35.13(a)(3)(A), 35.53(c)(2), and 35.57(1).

The new chapter implements the requirements of §35.595, Business & Commerce Code, and §11.309, Finance Code (the "State statutes"), pertaining to Texas Department of Banking (the "department") registering check verification entities ("entity" or "entities") and creating and maintaining a secure electronic notification system (the "system") to facilitate financial institutions sending information to the entities when requested by a customer who is the victim of an offense under §32.51, Penal Code.

During the 80th Texas Legislative Session, 2007, the legislature passed House Bill 2002 (HB 2002). House Bill 2002 added §35.595 to the Business & Commerce Code. This new statute requires a financial institution to submit information regarding a reported incident of fraudulent use or possession of identifying information ("fraud") to a secure electronic notification system established by the Banking Commissioner (the "commissioner"). Section 35.595 allows the commission to adopt rules to implement the section; clarify duties and responsibilities of the customer, financial institution, and check verification entity; and to specify how an erroneous notification may be withdrawn, amended, or corrected.

House Bill 2002 also added §11.309 to the Finance Code. This new statute requires the commission to adopt rules establishing the system and requiring entities to register with the commissioner.

New Chapter 35 of this title ("Chapter 35") implements House Bill 2002 by specifying the requirements for check verification entities to register with the department and for financial institutions to transmit information through the system regarding fraud to the registered check verification entities. Information on an account, closed because of fraud, is sent through the system at the request of the owner of the account. The entities use the information to recommend that their business customers reject checks written on the closed account. New Chapter 35 sets forth: how an entity registers with the department; the responsibilities of the commissioner; the procedure for a financial institution to report an offense under Penal Code, §32.51, to the system; and the procedure for correcting erroneous information sent through the system.

Pursuant to §35.595(e) and (g), Business & Commerce Code, and §11.309(b), Finance Code, the commission adopts §§35.1, 35.11 - 35.17, 35.31, 35.51 - 35.59, 35.71, and 35.72, to implement §35.595, Business & Commerce Code. New Chapter 35 clarifies the duties and responsibilities of a customer, financial institution, or entity under §35.595 and establishes a registration process, a reasonable annual fee, and the electronic notification system.

Section 35.1 defines the terms and phrases used in Chapter 35.

Sections 35.11 - 35.17 comply with the requirements in §11.309(b)(1) - (2) that the commission adopt rules addressing certain aspects of the registration of the entities.

Section 35.11 sets forth who must register with the commissioner as an entity.

Sections 35.12 and 35.13 set out the requirements for an entity to register with the department as an entity. Because the department is registering these entities, but not regulating them, the registration requirements are not as detailed as for other entities regulated by the department.

Section 35.14 provides that an entity must pay a $100 registration fee annually. The commissioner is statutorily authorized to charge the entities a reasonable annual registration fee, not to exceed $100. The commissioner has determined that an annual registration fee of $100 is necessary to offset the cost of the registration process.

Section 35.15 provides that all of the entities' registrations will expire on March 1 of each year.

Section 35.16 details the annual registration renewal requirements.

Section 35.17 sets out how long a registered entity has to inform the department about changes to its registration information.

Section 35.31 complies with §11.309(b)(3), which instructs the commission to adopt a rule requiring the commissioner to establish the system. The rule further states that the department will maintain the system, but will not verify the accuracy, validity, or completeness of information transmitted through the system. It also clarifies that the department is not the furnisher of the information to the entities.

Section 35.51 describes offenses under Penal Code, §32.51.

Section 35.52(a) encourages financial institutions to provide customers reporting offenses under Penal Code, §32.51, with sworn statement and the written authorization forms required by §35.595(b)(2) and (3), Business & Commerce Code, respectively. Further, when persons report directly to an entity that they were the victims of an offense under Penal Code, §32.51, §35.52(b) encourages the entity to provide those persons with the sworn statement form required by §35.595(e)(2)(B), Business & Commerce Code. Section 35.52(c) allows a financial institution or entity a method to provide forms on the Internet if the persons agree to receive them in that format.

Section 35.53 states that the department will provide model forms for the sworn statement and written authorization. Financial institutions and entities may use the model forms created by the department or use and accept other forms. The model forms will be on the department website. Financial institutions may combine the sworn statement and the written authorization into a single form. Financial institutions, entities, and banking regulators are encouraged to post these forms on their websites.

Section 35.54 sets out the requirements of the sworn statement required for financial institutions by §35.595(b)(2), Business & Commerce Code.

Section 35.55 contains the requirements of the written authorization required for financial institutions by §35.595(b)(3), Business & Commerce Code.

Section 35.56 contains the requirements of the sworn statement required for entities by §35.595(e)(2)(B), Business & Commerce Code.

Section 35.57 requires a financial institution to transmit the information set out in §35.595(d), Business & Commerce Code, through the system not later than the second business day after a customer notifies the financial institution of fraud and provides the financial institution with the statutorily required information and documents.

In recognition of the difficulty and delay involved in getting a police report, §35.58 gives a person the right to provide the financial institution or check verification entity with a police case or offense number in lieu of a copy of the police report.

As required by §35.595(e), Business & Commerce Code, new §35.59 sets out the procedures an entity must maintain to prevent recommending approval of a check or similar sight order after receipt of a notification of an offense under Penal Code, §32.51.

Section 35.71 requires a financial institution to correct incorrect information provided to the system in accordance with the Federal Credit Reporting Act, 15 U.S.C. §§1681 et seq. ("FCRA").

Section 35.72 requires an entity to process a notice of erroneous information received through the system in the same manner as it processes information received from its usual sources.

Concern has been expressed that the State statutes impose requirements in subject matters where States are prohibited from doing so by 15 U.S.C. §1681t. The commission does not believe that these sections violate §1681t or any other sections of FCRA.

The purpose of FCRA is to require that consumer reporting agencies adopt reasonable procedures that ensure accuracy and fairness in credit reporting and to require that such reporting is confidential, accurate, relevant, and proper. See 15 U.S.C. §1681. FCRA protects consumers' reputations and protects them against the dissemination of false or misleading credit information.

Except as provided in 15 U.S.C. §1681t(b) and (c), FCRA does not annul, alter, affect, or exempt any person subject to the FCRA from complying with the laws of any State with respect to collection, distribution, or use of any information on consumers, or for the prevention or mitigation of fraud, except to the extent that those laws are inconsistent with any provision of FCRA, and then only to the extent of the inconsistency. See 15 U.S.C. §1681t(a). Section 1681t(b), however, provides that no requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under several sections and subsections of FCRA.

Of the sections and subsections listed in §1681t(b), the only one where the State statutes could possibly have imposed a requirement or prohibition in violation of 15 U.S.C. §1681t, is 15 U.S.C. §1681s-2. Section 1681s-2 relates to the responsibilities of persons who furnish information to consumer reporting agencies. A closer look at §1681s-2, reveals that it relates to two subject matters: (1) the accuracy of information provided to consumer reporting agencies by furnishers of information and (2) the duties of furnishers of information upon notice of a dispute. The State statutes do not impose a requirement or prohibition in either of these subject matters. Section 1681s-2 deals with the duties of furnishers of information after the information is sent, while the State statutes impose a requirement for a financial institution to send information to check verification entities when requested by a consumer. With respect to furnishers of information to consumer reporting agencies the State statutes and these new rules merely require financial institutions to send certain customer information to entities when requested to do so by a customer.

New §35.71, does not impose a requirement or prohibition in the subject matter of §1681s-2; it merely requires that the financial institution comply with 15 U.S.C. §§1681 et seq.

Comments supporting the proposed new rules were received from The Independent Bankers Association of Texas. Comments suggesting an amendment to §35.11(1) was received from the Texas Bankers Association.

Summaries of the comments and commission responses are as follows:

COMMENT: One commenter believes a modification is needed to clarify that the phrase "consumer reporting agency" as used in §35.11(1) has the same meaning as the same phrase used in the Fair Credit Reporting Act.

RESPONSE: The commission agrees and amended §35.11(1) to clarify that a check verification entity must register if it is a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. Section 1861 et seq.).

COMMENT: Another commenter expressed support for §35.53 and §35.71 stating that these sections will improve compliance, save bank and regulatory time, and create consistency.

RESPONSE: The commission agrees.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §35.1

New §35.1 is adopted under the authority of Business & Commerce Code §35.595, which requires a financial institution to submit information reported by victims of an offense under §32.51 of the Penal Code to the system established by the commissioner; §11.309(b), Finance Code, which requires the commission to adopt rules requiring entities to register with the commissioner, authorizes the commissioner to charge a fee for registration, and establishes the system; and §31.003, Finance Code, which allows the commission to adopt rules to accomplish the purposes of the Texas Banking Act and Chapters 11, 12, and 13.

§35.1. Definitions.

In this subchapter:

(1) Banking commissioner--The Commissioner of the Texas Department of Banking.

(2) Department--The Texas Department of Banking.

(3) Electronic notification system--The secure e-mail or other secure system established under Section 11.309, Finance Code, and used by financial institutions to notify check verification entities as required by Section 35.595, Business & Commerce Code.

(4) Financial institution--A financial institution as defined by Section 35.595(a)(2), Texas Business & Commerce Code.

(5) Police report--A police report of an offense under Section 32.51, Penal Code.

(6) Sworn statement--The sworn statements referred to in Section 35.595(b)(2) and Section 35.595(e)(2)(B), Business & Commerce Code, except when the term is specifically limited to one of the sworn statements.

(7) Written authorization--The written authorization referred to in Section 35.595(b)(3), Business & Commerce Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706383
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: January 3, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 475-1300

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SUBCHAPTER B. REGISTRATION OF CHECK VERIFICATION ENTITIES

7 TAC §§35.11 - 35.17

New §§35.11 - 35.17 are adopted under the authority of §35.595, Business & Commerce Code, which requires a financial institution to submit information reported by victims of an offense under §32.51 of the Penal Code to the system established by the commissioner; §11.309(b), Finance Code, which requires the commission to adopt rules requiring entities to register with the commissioner, authorizes the commissioner to charge a fee for registration, and establishes the system; and §31.003, Finance Code, which allows the commission to adopt rules to accomplish the purposes of the Texas Banking Act and Chapters 11, 12, and 13.

§35.11. Who must register with the banking commissioner?

An entity is a check verification entity and must register with the banking commissioner if it:

(1) is a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.);

(2) contracts with businesses in this state to recommend acceptance or rejection of checks or similar sight orders received by the businesses; and

(3) compiles and maintains files on consumers on a nationwide basis regarding the consumers' check-writing history for those businesses with which it contracts.

§35.13. What must a check verification entity do to register in Texas?

(a) A check verification entity must complete and submit the registration form prescribed by the banking commissioner, which at a minimum, must include:

(1) the full legal name, any assumed name, principal business address, mailing address, business telephone number, facsimile number, and website address of the check verification entity;

(2) the full legal name, title, business telephone number, facsimile number, and e-mail address of the following persons associated with the check verification entity:

(A) the person responsible for questions about the registration or renewal process; and

(B) the person responsible for compliance with the requirements of §35.595, Business & Commerce Code.

(3) a statement that:

(A) the registration information is true and correct; and

(B) it has business clients in Texas and compiles and maintains files on consumers on a nationwide basis regarding consumers' check-writing history for those businesses;

(4) such other information as the banking commissioner may require, including information confirming that the registering entity is required to register under §35.11 of this title; and

(5) a certification by an authorized officer that the information therein is true and correct; and

(b) Submit the nonrefundable annual registration fee of $100 with the registration form.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706384

A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: January 3, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 475-1300

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SUBCHAPTER C. RESPONSIBILITIES OF THE BANKING COMMISSIONER

7 TAC §35.31

New §35.31 is adopted under the authority of §35.595, Business & Commerce Code, which requires a financial institution to submit information reported by victims of an offense under §32.51 of the Penal Code to the system established by the commissioner; §11.309(b), Finance Code, which requires the commission to adopt rules requiring entities to register with the commissioner, authorizes the commissioner to charge a fee for registration, and establishes the system; and §31.003, Finance Code, which allows the commission to adopt rules to accomplish the purposes of the Texas Banking Act and Chapters 11, 12, and 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706385
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: January 3, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 475-1300

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SUBCHAPTER D. PROCEDURE FOLLOWING A CUSTOMER REPORT OF AN OFFENSE UNDER SECTION 32.51, PENAL CODE

7 TAC §§35.51 - 35.59

New §§35.51 - 35.59 are adopted under the authority of §35.595, Business & Commerce Code, which requires a financial institution to submit information reported by victims of an offense under §32.51 of the Penal Code to the system established by the commissioner; §11.309(b), Finance Code, which requires the commission to adopt rules requiring entities to register with the commissioner, authorizes the commissioner to charge a fee for registration, and establishes the system; and §31.003, Finance Code, which allows the commission to adopt rules to accomplish the purposes of the Texas Banking Act and Chapters 11, 12, and 13.

§35.53. Will the department provide model forms for the sworn statement and written authorization required by Section 35.595(b)(2) and (3), Business & Commerce Code?

(a) The department has provided a model form combining the sworn statement under §35.595(b)(2), Business & Commerce Code, and the written authorization under §35.595(b)(3) for use by financial institutions.

(b) The department has provided a model form sworn statement under §35.595(e)(2)(B), Business & Commerce Code, for use by check verification entities.

(c) A financial institution or check verification entity may use and accept:

(1) the model forms provided by the department; and

(2) other forms that contain spaces for persons to provide the information required by §35.595, Business & Commerce Code, and this Chapter.

(d) The model forms in subsection (a) and (b) of this section are available on the department's website. The department encourages financial institutions, check verification entities, and other financial institution regulators to make the model forms, or the forms they use, available on their websites.

(e) A financial institution may use and accept a form that combines the sworn statement and the written authorization into a single form.

§35.57. When must a financial institution submit customer information through the electronic notification system?

A financial institution must submit the information required by §35.595(d), Business & Commerce Code, to the electronic notification system not later than the second business day after the date the customer:

(1) notifies the financial institution that the customer was a victim of an offense under §32.51, Penal Code;

(2) requests the financial institution close an account that has been compromised by the alleged offense; and

(3) presents to the home office, if in Texas, or to any branch of the financial institution in Texas:

(A) an incident or case number of the police report or a copy of the police report of an offense under §32.51, Penal Code;

(B) the sworn statement required by §35.595(b)(2), Business & Commerce Code; and

(C) the written authorization required by §35.595(b)(3), Business & Commerce Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706386
A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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SUBCHAPTER E. PROCEDURES WHEN INCORRECT INFORMATION IS REPORTED TO THE CHECK VERIFICATION ENTITY

7 TAC §35.71, §35.72

New §35.71 and §35.72 are adopted under the authority of §35.595, Business & Commerce Code, which requires a financial institution to submit information reported by victims of an offense under §32.51 of the Penal Code to the system established by the commissioner; §11.309(b), Finance Code, which requires the commission to adopt rules requiring entities to register with the commissioner, authorizes the commissioner to charge a fee for registration, and establishes the system; and §31.003, Finance Code, which allows the commission to adopt rules to accomplish the purposes of the Texas Banking Act and Chapters 11, 12, and 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 89. PROPERTY TAX LENDERS SUBCHAPTER E. DISCLOSURES

7 TAC §§89.501 - 89.507

The Finance Commission of Texas (commission) adopts new 7 TAC, Chapter 89, §§89.501 - 89.507, concerning Property Tax Lenders. The new rules contained in 7 TAC §§89.501 - 89.507 outline Subchapter E, concerning Disclosures.

As a note of background regarding these rules, the property tax lender industry is a fairly young industry (approximately 10-12 years old) and an industry newly regulated by the agency. The agency decided that it would be in the best interest of consumers as well as the industry to gather information from interested stakeholders in order to prepare an informed and well-balanced rule action for the commission on the issue of disclosures. Accordingly, the agency distributed an Advance Notice of Proposed Rulemaking (ANPR) and received written comments from several interested stakeholders. Subsequently, the agency held a stakeholders meeting where several stakeholders provided verbal testimony and elaborated on their written comments to the ANPR.

Upon review of all the thorough and insightful commentary provided, the agency also distributed two rule drafts to the growing list of stakeholders for specific early or pre-comment prior to the presentation of the rules to commission. The agency believes that this early participation of stakeholders in the rulemaking process has greatly benefited the resulting adoption. Sections 89.504, 89.506 and 89.507 are adopted with changes to the proposal published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7802). Sections 89.501 - 89.503 and 89.505 are adopted without changes and will not be republished.

In addition to the pre-comments received prior to the proposal, the agency received five (5) written comments during the official comment period from the following parties: the Texas Property Tax Lenders Association (TPTLA); Texas RioGrande Legal Aid, Inc.; Crain, Caton & James, PC; Jordan, Hyden, Womble, Culbreth & Holzer, PC; and Senator Kirk Watson. The TPTLA's comments are prefaced with support of the proposed regulations, and similarly, Senator Watson noted his support for the work being done by the commission in promulgating these rules for property tax lenders. Four of the comments present issues geared toward clarifying or enhancing the effectiveness of the rules. The comment from Texas RioGrande Legal Aid, Inc. is generally not in support of the proposed rules. All of the comments offer specific suggestions to certain provisions of the rules, and each issue commented upon will be addressed below following the purpose for the particular rule.

In general, the purpose of the new rules is to establish for property tax lenders certain disclosures required under Senate Bill 1520 (SB 1520), as enacted by the 80th Texas Legislature. The individual purposes of each rule are provided below.

Section 89.501 outlines the purpose of Subchapter E, which is to provide disclosures for property tax loan transactions.

Section 89.502 provides definitions to be used in Subchapter E, including the incorporation of definitions contained in the Texas Finance Code and the Texas Tax Code.

Section 89.503 prescribes the general format of the disclosures contained in Subchapter E, including readable typefaces and point sizes.

Section 89.504 outlines the requirements for the disclosure statement provided to a property owner under Texas Tax Code, §32.06(a-4)(1). Subsection (a) describes the required elements that must be included in the disclosure statement.

One commenter believes that the disclosure statement should contain an introduction that "should explain that the notice is required by law and list the HUD-housing counselor number as a resource . . . and the law help number . . . ." In order to maintain a single-page disclosure statement, the commission believes that providing the agency's contact information, including the Consumer Helpline and website, is sufficient. For those property owners who visit the agency's website, the numbers suggested by the commenter are available under Links/Consumer Resources. Thus, the commission declines to add these resource numbers to the disclosure statement.

Two commenters suggest that the proposed required elements in §89.504(a) include the following: "a statement that informs the property owner that on January 1 of each year, all property owners have a tax lien in favor of the governmental taxing unit(s) against the owner's property or homestead for unpaid property taxes but that the governmental taxing unit(s) must file a lawsuit and obtain a judgment in order to foreclose its lien." While the suggested language is not utilized in the proposed required elements and disclosure statement, the commission agrees with the concept contained in the first half of the offered statement

(through the word "taxes"). The commission believes that the rule as proposed already incorporates this concept. Regarding the latter phrase concerning the need for the taxing unit(s) to file suit to foreclose, the commission believes that in the interest of a single-page, plain language consumer notice, this language is not necessary. Consequently, the commission declines the latter half of the suggested statement and maintains the proposed language incorporating the first half of the statement.

The two commenters recommend that §89.504(a) include the following: "a statement that the property owner may authorize, in writing, the property tax lender to pay the unpaid property taxes and transfer the tax lien from the governmental taxing unit(s) to the property tax lender resulting in a property tax loan with the property tax lender; and that this transaction does not remove the tax lien against the property;" and "a statement that if the property owner does not pay the tax loan, the property owner may lose the property." (Note: One commenter has been quoted exactly, while the other commenter's suggested language, though not identical, is very similar.) The commission agrees with the inclusion of these concepts within the required elements and disclosure statement. As noted above, although the exact language offered is not contained in the proposal, the commission believes that all of the concepts contained in these statements are already incorporated in the proposed language. Therefore, the commission maintains the proposed language including these concepts.

The two commenters also offer the following language for §89.504(a): "a statement that the transferred tax lien and tax loan may be considered a default by any mortgage holder with a lien on the same property, and the only way to correct the default is to pay off the tax loan and have the transferred tax lien released." (Note: One commenter has been quoted exactly, while the other commenter's suggested language, though not identical, is very similar.) The commission agrees that a homeowner that allows the creation of the tax lien by not paying the property taxes had defaulted on any mortgage against the same property. The notice informs the owner that the creation of the tax lien may be considered a default and that the only way to correct the default is to pay off the tax lien and have the lien released. The commission believes that the language in the notice is conceptually the same as that recommended by the commenter. Consequently, the commission maintains the proposed language including these concepts.

One commenter suggests that §89.504(a) include the following: "a statement that a tax loan or transferred tax lien may be foreclosed if the loan is in default, and the cost of foreclosure may be added to the amount owed by the property owner under the tax loan." The commenter states that the purpose of the revision is "to reference the tax loan and transferred tax lien and the fact that foreclosure may result from not paying this tax loan, as opposed to a [sic] 'any secured loan' or 'mortgage' . . . ." The commission believes that in keeping with the plain language approach of this consumer notice, the recommended distinction is not necessary. Thus, the commission declines the suggested statement and maintains the proposed language in this adoption.

Regarding tax deferral, one commenter recommends that the required element in §89.504(a) as well as the disclosure statement "state that a deferral is available as opposed to 'may be available' in those circumstances. The statute language used 'may' because it did not list one major reason deferral is not available (non-homestead property)." The commenter continues by stating that the disclosure could address this exception without using the word "may." The commission agrees with this suggestion and has deleted the phrase "may be eligible for" and replaced it with "are entitled to" in both §89.504(a) and in Figure 7 TAC §89.506(a).

One commenter believes that the statement concerning the superior nature of a property tax loan over other liens should be deleted. The commission disagrees with the commenter and believes that lien priority is essential in evaluating a secured transaction. This information is important so that the property owner can understand the options available prior to entering a property tax loan and be able to make better decisions after closing. Accordingly, the commission declines to remove the superior lien statement and maintains that language with this adoption.

Two commenters suggest that the proposed required elements in §89.504(a) include an additional disclosure "to inform the property owner that unless they [sic] agree in writing, the tax lien lender cannot pay or loan money for the property owner's non delinquent taxes." The commission agrees with the addition of the concept contained in this disclosure, which has been added as new §89.504(a)(5). As a result, the disclosure statement contained in Figure 7 TAC §89.506(a) includes the following corresponding statement under the heading "What is a property tax loan?": "Unless you agree in writing, the property tax lender may not include your non-delinquent taxes in your property tax loan."

The two commenters further offer a second additional disclosure: "a statement that the property tax lender may add 'up front' closing costs, escrow fees, attorney's fees, other charges and interest up to 18% in connection with the property tax loan and the property owner should inquire as to these amounts, the total amount of the loan, the interest rate, the monthly payment amount and the number or [sic] monthly payments." (Note: One commenter has been quoted exactly, while the other commenter's suggested language, though not identical, is very similar.) The commission agrees with the addition of some of the concepts contained in this disclosure, which has been broken into smaller statements and key components added as new §89.504(a)(6), (a)(7), and (a)(16). Accordingly, the disclosure statement contained in Figure 7 TAC §89.506(a) includes the following corresponding statements under the heading "What is a property tax loan?": "The property tax loan may include unpaid property taxes, penalties, and interest. The property tax lender may also assess closing costs and interest not to exceed 18%." Regarding the consumer education concept, the following statement has been added as the very last sentence to Figure 7 TAC §89.506(a): "You should ask about the terms of any loan you are considering and you should read any document before signing it."

Two commenters recommend that the disclosure statement contain a dated signature line. Although SB 1520 does not include this requirement, the commission agrees that it is a good business practice. As such, proposed §89.507(a)(4) provides property tax lenders with the option of adding a dated signature block. Hence, the commission maintains this optional provision, although it has been revised in response to another comment. Please see the explanation under §89.507 below.

One commenter requests that the disclosure statement provide a more balanced message to the property owner. The commenter suggests adding the following statement: "You are not required by law to enter into a property tax loan, but it may provide you with the most affordable way to repay your property taxes." SB 1520 has an underlying purpose of consumer pro-

tection, as stated in the Author's/Sponsor's Statement of Intent: "S.B. 1520 amends current statute regarding certain aspects of ad valorem tax lien transfers and includes *additional protections to consumers* who authorize lien transfers for the payment of property taxes." (emphasis added). The disclosure statement serves as a consumer warning notice, akin to other consumer notices (e.g., home equity). The commission believes that the disclosure statement provides the proper tone and information to give effect to the statutory intent. Thus, the commission declines to revise the disclosure statement as suggested by the commenter.

Subsection (b) of §89.504 requires that the disclosure statement fit on one standard-size sheet of paper and that the disclosure be delivered in a manner that does not minimize its significance.

One commenter suggests the following: "An additional rule should be added to make it clear that the disclosure cannot be buried with other advertisements, disclosures, or documents such that a borrower does not see it or its emphasis is diminished." Although the commission declines to adopt a separate rule on this issue, the commission recognizes the concerns presented by the commenter. Consequently, the commission has decided to add a sentence to §89.504(b) which is intended to capture the spirit of the commenter's suggestion. The new sentence reads: "The disclosure statement must be delivered in a manner that does not minimize its significance."

Section 89.504(c) details how the disclosure statement must be delivered, and subsection (d) explains how that delivery must be verified.

Concerning §89.504(c)(2) and (d)(2), one commenter states that the language as proposed would "prohibit the use of a courier, overnight delivery service . . . or email," and requests that other delivery methods be allowed. With regard to delivery by a courier or overnight delivery service, the commission agrees that these methods should be permitted and that they provide adequate means by which to verify delivery. Therefore, clarifying subparagraphs have been added and other revisions have been made to both §89.504(c)(2) and (d)(2) to allow delivery by courier service, by commercial delivery service with tracking abilities, as well as the additional option of certified mail with return receipt requested.

One commenter believes that delivery of the disclosure statement by regular U.S. mail should not be permitted. The commission recognizes the commenter's concern in that a property tax lender assumes a risk if the disclosure is only provided by regular U.S. mail. The rule creates a rebuttable presumption whereby the property owner can state that the owner did not receive the disclosure. Furthermore, as outlined above, the delivery options have been expanded in response to another comment, with the additions of delivery by commercial delivery service, by courier service, and by certified mail with return receipt requested. The commission believes that these delivery methods provide the appropriate flexibility to the lenders and the necessary verification to fulfill the statute. Accordingly, while the commission declines to remove delivery by U.S. mail, the commission has added delivery by courier and certified mail as requested by the commenter.

The commenter also states that "fax delivery should not be allowed," as it is "too unreliable." The commission disagrees with the commenter, as fax delivery is a reliable and more expedient alternative that has become commonplace in the business world. The commission does, however, understand the commenter's concerns as to other parties having access to a common fax and the possibility that the property owner may not receive the disclosure. As a result, the commission believes that the addition of rebuttable presumption language is appropriate for fax delivery and has added language to that effect to §89.504(c)(2).

Under §89.504(c) regarding delivery timing, one commenter requests the following new subsection (c)(3): "The disclosure statement must be provided to the property owner and signed by the property owner not later than the 12th day before the date a property owner executes a sworn authorization described by Section 32.06(a-1)." The commenter offers this language, which is identical to that for home equity lending, arguing that the proposal does not provide sufficient time for the property owner to read and understand the disclosure before closing. Although the commission considered this delivery timing concept, the time sensitivity of property tax loans results in a very different timing approach than that for home equity loans. The provisions concerning the timing of delivery are modeled after RESPA language. The commission believes that the proposed timing provides an appropriate balance of adequate time for consumers to read and absorb the disclosure information, while taking into account the need for a shorter time frame to try and minimize the imposition of large tax penalties. Thus, the commission declines to add the commenter's suggested provision.

Another commenter states that "the proposed rules do not place any time period between receiving the notice and closing. The disclosure must be given beforehand, and not concurrently or after closing." The commission agrees with the commenter's latter statement that the disclosure must be given before closing, but disagrees as to the content of the rules, as they already require that the disclosure statement be given "prior to closing." The commenter further states: "The delivery of the notice and the closing therefore should not be within three business days of each other unless . . . [certain foreclosure conditions are met]." As explained in response to the comment above, property tax loans are highly time sensitive, and the commission maintains that the proposed timing appropriately balances the needs of consumers and lenders. Although the commission declines to adopt the suggested timing, the issue will be noted for further study. The delivery timing may be revisited at a future date after the agency has greater experience through regular examinations of the industry.

The commenter also states the following related to delivery timing: "The disclosure cannot be stale. Sending the disclosure two months before closing the loan is too far in advance of closing, and the disclosure must be resent." The commission declines to adopt this suggestion, as it is believed that a two-month delay is not common in the closing of property tax loans; however, the commission will note this issue for further study as well.

Also regarding §89.504(c), since the proposal the commission has further considered the issue of delivery to co-applicants. As a result, the commission has decided to remove the option for a co-applicant to accept delivery of the disclosure statement for another co-applicant at the time of an interview. Due to the important nature of this disclosure and for consumer protection purposes, the commission believes that only those owners present at the interview should accept delivery on their own behalf.

Subsection §89.504(e) outlines acknowledgment provisions and includes requirements for married property owners and property owned by a legal entity.

Additionally, since the proposal an organizational clarification has been made in §89.504 resulting in new subsection (e) (proposed (d)(3)), entitled "Acknowledgment at time of closing." Other than the use of the term "acknowledgment" and renumbering, the language of these provisions remains the same as in the proposal. The commission believes that this organizational change provides better clarity in that the signatures obtained at closing reflect acknowledgment of the delivery of the disclosure prior to closing.

Section 89.505 outlines the requirements for the notice of delinquency sent by the mortgage servicer or the holder of the first lien to the transferee of a tax lien under Texas Tax Code, §32.06(f-1). Subsection (a) lists the required elements that must be included in the notice of delinquency. Subsection (b) outlines the delivery requirements, and subsection (c) describes how that delivery must be verified.

Section 89.506 provides the required disclosure statement under Texas Tax Code, §32.06(a-4)(1), and a sample model notice of delinquency under Texas Tax Code, §32.06(f-1).

Since the proposal, although the commission declines to adopt the disclosure statement forms in their entirety offered by three commenters, the disclosure statement contained in Figure 7 TAC §89.506(a) has been modified with concepts suggested by the commenters. Please refer to the explanation under §89.504(a) for the details of these revisions.

Section 89.507 describes the permissible changes that may be made to each of the disclosures. The disclosure statement is a strict, prescribed form that may only be changed according to the exclusive list outlined in §89.507(a). In contrast, the notice of delinquency form is simply a model disclosure that may experience several modifications, as outlined in §89.507(b), which offers flexibility to the provider of the notice. The different approaches utilized for the two disclosures echo the statute, as the disclosure statement is mandated by the statute, whereas the notice of delinquency is optional.

Regarding permissible changes under §89.507, one commenter states: "Changes made to the disclosure by the lender may not make the disclosure longer than one page." Although the rules do not prohibit a property tax lender from providing additional information, the required disclosures must be provided on a single page, as per §89.504(b).

One commenter raises the inconsistency between §89.507(a)(4) and §89.504(d) as proposed, stating the following: "The requirements relating to verification of delivery in §89.504(d) (especially (d)(3)) and the optional language that may be added pursuant to §89.507(a)(4) are not consistent . . . ." The commenter continues by explaining that the proposed optional signature line would only indicate receipt and not provide the proper acknowledgment prior to closing required by §89.504(d).

The commission agrees with the need for consistency with these delivery verification provisions and strives for a harmonious approach throughout the rules. Accordingly, the commission has revised §89.507(a)(4) by adopting the commenter's suggested acknowledgment language, in order to more closely follow the requirements contained in §89.504(d).

The commenter also requests that the acknowledgement of receipt allow "a representation as to the property owner's marital status" as well as "a representation that a person signing on behalf of a legal entity is, in fact, authorized to do so." The commenter believes that both of these representations would aid in compliance. The commission agrees with the commenter and has provided optional affirmation statements in new subparagraphs (A) and (B) of §89.507(a)(4) that may be utilized by the property tax lender.

Another commenter requests that the disclosure list "the name of the person it was intended for, the method of delivery, date it was delivered or sent, and the address of the property, and the person who delivered or sent it." The name of the property owner and the date signed are already provided for in the optional signature block in §89.507(a)(4), as revised by this adoption. The commission agrees that the address of the property may be added as part of the optional signature block and has provided that option in new subparagraph (C) of §89.507(a)(4). The commission declines to add the delivery method or person who delivered or sent the disclosure statement. The commission believes that this information is not necessary for the disclosure itself and may be evidenced by cover documents.

Since the proposal, technical changes have been made throughout the rules to utilize singular grammatical references to "the property owner." The commission believes that this singular usage is the most clear from a grammatical and rule construction standpoint. It is well understood and evident from other language within the rules that there may be multiple property owners.

These new sections are adopted under Texas Tax Code, §32.06(a-4) and (f-1), which authorize the Finance Commission to adopt rules to establish certain disclosures for property tax lenders.

The statutory provisions affected by the adopted new sections are contained in Texas Tax Code, §32.06 and §32.065, and Texas Finance Code, Chapter 351, Property Tax Lenders, known as the "Property Tax Lender License Act" (Acts 2007, 80th Leg., ch. 1220, eff. Sept. 1, 2007).

§89.504. Requirements for Disclosure Statement to Property Owner.

(a) Required elements. A disclosure statement under Texas Tax Code, §32.06(a-4)(1) to be provided to a property owner before the execution of a tax lien transfer must contain the following required elements:

(1) the property tax lender's name, principal business address, and license number;

(2) a statement that the property owner currently has a lien against the owner's property for unpaid property taxes;

(3) a statement that the property owner can pay the taxing unit(s) directly;

(4) a statement that the property owner may authorize that the lien of the taxing unit(s) be transferred to the property tax lender;

(5) a statement that unless the property owner agrees in writing, the property tax lender may not include non-delinquent taxes in the property tax loan;

(6) a statement that the property tax loan may include unpaid property taxes, penalties, and interest;

(7) a statement that the property tax lender may also assess closing costs and interest not to exceed 18%;

(8) a statement that the property tax loan is superior to any other preexisting lien on the property;

(9) a statement that if the property is a homestead, disabled persons or persons age 65 or older are entitled to tax deferral under Texas Tax Code, §33.06;

(10) a statement that there may be alternatives available to the property owner instead of the property tax loan, (e.g., entering into a payment installment agreement with the taxing unit(s), financing options through an existing mortgage lender or other private lenders, borrowing from savings or family members);

(11) a statement that if the property owner does not pay, the property owner may lose the property;

(12) a statement that the tax lien may be considered a default by any mortgage holder with a lien on the same property, and the only way to correct the default is to pay off the taxes and have the lien released;

(13) a statement that any secured loan may be foreclosed if the loan is in default, and the cost of a foreclosure, either tax lien or mortgage, may be added to the amount owed by the property owner;

(14) a statement that the property owner may contact the Office of Consumer Credit Commissioner about questions or problems, listing the OCCC's address, toll-free consumer helpline, and website, as follows: 2601 North Lamar Boulevard, Austin, Texas 78705-4207, (800) 538-1579, www.occc.state.tx.us;

(15) a statement that the property owner may seek the advice of an attorney or another third party before signing a property tax loan; and

(16) a statement that the property owner should ask about the terms of any loan and should read any document before signing it.

(b) Single page required. The disclosure statement required by §89.506(a) of this title (regarding Disclosures) must fit on one standard-size sheet of paper (8 1/2 by 11 inches). The disclosure statement must be delivered in a manner that does not minimize its significance.

(c) Delivery.

(1) Face-to-face interview before closing. In the case of a face-to-face interview, a property tax lender must provide a disclosure statement containing all of the elements outlined by subsection (a) of this section, as prescribed by Figure: 7 TAC §89.506(a) of this title, to the property owner at the time of the interview. A property owner present at the interview may sign an acknowledgment verifying receipt of the disclosure statement at that time.

(2) No face-to-face interview. If there is no face-to-face interview, a property tax lender must deliver a disclosure statement containing all of the elements outlined by subsection (a) of this section, as prescribed by Figure: 7 TAC §89.506(a) of this title, to the owner of the property.

(A) Method of delivery. The disclosure statement may be delivered by U.S. mail, with prepaid first-class postage, or via facsimile if available to the property owner. Alternatively, property tax lenders may deliver the disclosure statement by certified mail with return receipt requested, by using a commercial delivery service with tracking abilities, or by using a courier service.

(B) Timing of delivery. The disclosure statement must be delivered within three business days from receipt of the property owner's application for a property tax loan, or within three business days from the date that the property tax lender first has knowledge of the property owner's agreement to enter into a property tax loan with the property tax lender.

(C) Co-applicants. If property owners who are co-applicants provide the same mailing address, one copy delivered to that address is sufficient. If different addresses are shown by co-applicants, a copy must de delivered to each of the co-applicants.

(d) Verification of delivery.

(1) At time of face-to-face interview before closing. At the time of a face-to-face interview, verification that a disclosure was provided under this section is not required, but may be established by a signed and dated acknowledgment of the property owner obtained at the time of the interview.

(2) No face-to-face interview. If there is no face-to-face interview, the property tax lender must deliver the disclosure statement to the property owner as prescribed in subsection (c)(2) of this section.

(A) Verification of delivery by mail. The property tax lender must allow a reasonable period of time for delivery by mail. A period of three calendar days, not including Sundays and federal legal public holidays, constitutes a rebuttable presumption for sufficient mailing and delivery.

(B) Verification of delivery via facsimile. For disclosures delivered via facsimile, a dated facsimile confirmation page indicating that the disclosure statement was successfully transmitted to the fax number provided by the property owner will constitute a rebuttable presumption for sufficient delivery.

(C) Verification of delivery by certified mail with return receipt requested. For disclosures delivered by certified mail with return receipt requested, a dated return receipt indicating that the disclosure statement was successfully delivered to the property owner's address will constitute verification of delivery.

(D) Verification of delivery by commercial delivery service with tracking abilities. For disclosures delivered by commercial delivery service, a dated receipt indicating that the disclosure statement was successfully delivered to the property owner's address will constitute verification of delivery.

(E) Verification of delivery by courier service. For disclosures delivered by courier service, a dated receipt indicating that the disclosure statement was successfully delivered to the property owner will constitute verification of delivery.

(e) Acknowledgment at time of closing. At the time of closing, a property tax lender may deliver an additional copy of the disclosure statement prescribed by Figure: 7 TAC §89.506(a) of this title, but is not required to do so. The property tax lender must obtain a dated acknowledgment signed by the property owner stating that the property owner received the disclosure statement prior to closing. The acknowledgment of receipt may be included on the disclosure form as provided in §89.507(a)(4) of this title (relating to Permissible Changes).

(1) Married property owners. If the property is designated as a homestead, the signatures of both spouses must be obtained by the property tax lender in order to acknowledge delivery of a disclosure under this section.

(2) Property owned by a legal entity. If the property is owned by a legal entity (e.g., a living trust), the signature of a person with authority to sign on behalf of the legal entity must be obtained by the property tax lender in order to acknowledge delivery of a disclosure under this section.

§89.506. Disclosures.

(a) The required disclosure statement under Texas Tax Code, §32.06(a-4)(1) to be provided to a property owner before the execution of a tax lien transfer is presented in the following figure.
Figure: 7 TAC §89.506(a)

(b) A sample model notice of delinquency under Texas Tax Code, §32.06(f-1) that may be sent by the mortgage servicer or the

holder of the first lien to the transferee of a tax lien is presented in the following example.
Figure: 7 TAC §89.506(b)

§89.507. Permissible Changes.

(a) A property tax lender must use the required disclosure statement under Texas Tax Code, §32.06(a-4)(1) as prescribed by Figure: 7 TAC §89.506(a) of this title, but may consider making only limited technical changes, as provided by the following exclusive list:

(1) Substituting "transferee" for "property tax lender," or using pronouns such as "we" and "us";

(2) Substituting "borrower" for "property owner," or using pronouns such as "you" and "your";

(3) Substituting "tax lien transfer" for "property tax loan"; or

(4) Adding an optional, dated signature block at the very bottom of the disclosure form, which must include the following statement directly above the signature line of the property owner(s): "ACKNOWLEDGMENT OF RECEIPT: By signing below, I acknowledge only that I have received a copy of this disclosure prior to closing, this ___ day of _____, 20__."

(A) Adding an optional affirmation statement to the optional signature block for married property owners: "I affirm that I am married to _____ (insert name of spouse)."

(B) Adding an optional affirmation statement to the optional signature block for persons signing on behalf of a legal entity: "I affirm that I am authorized to sign this document on behalf of _____ (insert name of legal entity property owner)."

(C) Adding the property owner's address to the optional signature block.

(b) A property tax lender may consider making the following types of changes to the model notice of delinquency under Texas Tax Code, §32.06(f-1) as provided by Figure: 7 TAC §89.506(b) of this title:

(1) Adding information related to information set forth in the model disclosures that is not otherwise prohibited by law;

(2) Substituting "property tax lender" for "transferee," or using pronouns such as "you" and "your";

(3) Substituting "borrower" for "property owner";

(4) Presenting the model clauses in any order, and combining or further segregating the model clauses, if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures;

(5) Inserting descriptive titles, headings, subheadings, numbering, captions, and illustrative or explanatory tables or sidebars may be used to distinguish between different levels of information or to provide emphasis; or

(6) Making other changes which do not affect the substance of the disclosures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Leslie L. Pettijohn
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Office of Consumer Credit Commissioner
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SUBCHAPTER F. COSTS AND FEES

7 TAC §89.601

The Finance Commission of Texas (commission) adopts new 7 TAC, Chapter 89, §89.601, concerning Property Tax Lenders. The new rule contained in 7 TAC §89.601 outlines Subchapter F, concerning Costs and Fees.

As a note of background regarding these rules, the property tax lender industry is a fairly young industry (approximately 10-12 years old) and an industry newly regulated by the agency. The agency decided that it would be in the best interest of consumers as well as the industry to gather information from interested stakeholders in order to prepare an informed and well-balanced rule action for the commission on the issue of fees. Accordingly, the agency distributed an Advance Notice of Proposed Rulemaking (ANPR) and received written comments from several interested stakeholders. Subsequently, the agency held a stakeholders meeting where several stakeholders provided verbal testimony and elaborated on their written comments to the ANPR.

Upon review of all the thorough and insightful commentary provided, the agency also distributed two rule drafts to the growing list of stakeholders for specific early or pre-comment prior to the presentation of the rule to commission. The agency believes that this early participation of stakeholders in the rulemaking process has greatly benefited the resulting adoption. The new rule is adopted with changes to the proposal published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7806).

In addition to the pre-comments received prior to the proposal, the agency received five (5) written comments during the official comment period from the following parties: the Texas Property Tax Lenders Association (TPTLA); the Independent Bankers Association of Texas (IBAT); Texas RioGrande Legal Aid, Inc.; Crain, Caton & James, PC; and Jordan, Hyden, Womble, Culbreth & Holzer, PC. The TPTLA's comments are prefaced with support of the proposed regulations. Four of the comments present issues geared toward clarifying or enhancing the effectiveness of the rule. The comment from Texas RioGrande Legal Aid, Inc. is generally not in support of the proposed rule. All of the comments offer specific suggestions to certain provisions of the rule, and each issue commented upon will be addressed below following the purpose for the particular rule provision.

In general, the purpose of the new rule is to establish for property tax lenders reasonable fees for closing costs required under Senate Bill 1520 (SB 1520), as enacted by the 80th Texas Legislature. The individual purposes of each subsection of the rule are provided below.

Section 89.601 provides the requirements regarding fees for closing costs that may be charged, contracted for, or received by property tax lenders.

Subsection (a) of §89.601 outlines the applicability of the fee limitations to property designated as "Category A (Real Property:

Single-Family Residential)," and homesteads designated as "Category E (Real Property: Farm and Ranch Improvements)" by the Property Classification Guide published by the Texas Comptroller of Public Accounts.

Section 89.601(a) establishes what reasonable fees for closing costs are for a property tax loan secured by real property that is designed for single-family residential use. Agency staff advised a representative of the Texas Association of Assessing Officers concerning the intended scope of this rule and was directed to the Property Classification Guide published by the Texas Comptroller of Public Accounts. The two selected categories capture the majority of property used for single-family residential use, which would most likely benefit from additional protections for consumers as identified in the Author's/Sponsor's Statement of Intent for SB 1520 (cited above). Furthermore, utilizing these two categories, as defined by the Comptroller, provides certainty to the industry and consumers on the applicability of the fee limitations.

One commenter requests guidance either in the rule or in supplemental materials regarding "reasonable costs on other types of properties, for example, unimproved property, or retail, commercial or other business property." The commission drafted the applicability provision as outlined above in order to give effect to the consumer protection purpose underlying SB 1520. Thus, although the commission declines to offer guidance on other types of property at this time, this issue will be noted for further study.

Subsection (b)(1) explains the scope of the closing costs, which includes costs incurred by a property tax lender from the time of application through the time of closing. Under §89.601(b)(2), a non-comprehensive list of examples of closing costs is provided. Again, the list contained in subsection (b)(2) is not an exhaustive or comprehensive list. The rule limits what an owner may be charged on a property tax loan. The list in the rule contains examples of the types of fees for closing costs a property tax lender might incur. Just because a particular fee is not contained in the list does not mean that it can be used to charge an owner more than the maximums or that the omitted fee cannot be charged.

Regarding proposed §89.601(b)(2)(F), which provides an allowable example of "a document preparation fee," one commenter requests that either the regulation or supplemental material provide a warning that "other law may limit the ability to charge this and other fees." The commenter cites the following laws that may limit this fee: the Real Estate Settlement Procedures Act (RESPA), Truth in Lending requirements, and Texas Government Code, §83.001. The commission generally agrees with the commenter in that other applicable law may limit some of the fees under §89.601. As a result, the commission has added the commenter's suggested disclaimer or warning statement to §89.601(b)(2).

In a related comment, another commenter suggests the clarification "that fees paid to third parties be limited to the actual charges of those third parties with no up-charge by the lender." This commenter also cites RESPA and Truth in Lending regulations. The commission recognizes this concern and believes that the disclaimer statement added to §89.601(b)(2) as explained above, serves to incorporate the suggestion of this commenter as well.

Concerning proposed §89.601(b)(2)(I), which provides an allowable example of "a loan origination fee," the commenter suggests that this example could be worded as follows: "a loan origination *or commitment* fee." The commenter states that "some lenders call the origination fee a 'commitment' fee." As noted above, the list contained in subsection (b)(2) is not an exhaustive list, and the commission believes that the examples serve to provide a general guide and are not intended to cover all possible labels or terms that might be used for particular fees. Therefore, the commission declines to adopt this change.

Also regarding proposed §89.601(b)(2)(I), another commenter argues that "a loan origination fee is not a fee but rather is interest under Texas usury law." The commenter strongly recommends deletion of this provision from the list of permissible fees. Again, as reiterated with respect to the commenter above concerning this same subparagraph, the items contained in §89.601(b)(2) are merely a non-comprehensive list of examples. The loan origination fee is included in the list as an example of a possible closing cost fee or charge, but this inclusion or label is not determinative. The rule is drafted so that no matter how the money or charge is labeled, the reasonable closing costs are limited to the amounts specified in the rule. Additionally, the authorization for the reasonable closing costs fees is Texas Tax Code, §32.06(e), which provides that a property tax lender may advance funds for a tax lien for interest "plus" reasonable closing costs. The bottom line is that any and all reasonable closing costs must be charged according to the fee maximums permitted by the rule. The commission disagrees with the commenter's reasoning but agrees to omit the phrase, "a loan origination fee" in order to avoid confusion.

In reference to proposed §89.601(b)(2)(M), which provides an allowable example of "a fee for federally-mandated fees," one commenter was not aware of any fee that would fall under this category. The commenter requests the deletion of this subparagraph "since it would not seem to authorize any known fee." Unable to determine a fee fitting this criterion, the commission agrees with the commenter and has deleted this provision from the adoption.

Subsection (c) of §89.601 describes provisions related to the total maximum fees for closing costs that may be charged, contracted for, or received by a property tax lender. Subsection (c)(1) explains that the maximum fees include funds received by third parties or those retained by the property tax lender. Consequently, a maximum fee amount or ceiling is determined by the total amount of fees for closing costs paid by the property owner.

Under §89.601(c)(2), the maximum fee limits for closing costs are outlined, according to the total amount of money paid by a property tax lender to the taxing unit(s) to obtain transfer of the tax lien, which is known as the "total tax lien payment amount." Subsection (c)(3) states that the maximum fees contained in subsection (c)(2) constitute "reasonable closing costs" under Texas Tax Code, §32.06.

One commenter "requests an increase of an additional $250.00 for at least the two smallest brackets to compensate for the recovery of costs and profit for industry participants and an additional $50.00 for all brackets to directly compensate for the cost of complying with the new notice requirements." Regarding the new notice requirements, the commenter states: "Tracking and providing the statutorily required notices to the first lien holders and mortgage servicers is a labor intensive process that could easily require one or more staff members for some tax lien lenders."

In contrast, another commenter requests that each bracket of the maximum fee limits in §89.601(c)(2)(A) - (E) be reduced by $250. A third commenter states that "the closing cost cap should be flat and bright" and that there "should be no open-ended amounts

as being proposed (e.g., 10 percent of the loan amount)." This commenter further believes that the "closing cost cap should be lower to reflect actual fees incurred."

During this rulemaking process, in conjunction with the Advance Notice of Proposed Rulemaking (ANPR) and stakeholders meeting, the agency was informed that some property tax lenders could execute property tax loans for a flat fee ranging from $595 to $995. Conversely, others indicated that some lenders charge a great deal more than the maximums contained in the rules. As the rule maximums fall somewhere in the middle, there appear to be multiple market participants that are able to operate this level of fees.

In reference to the cost to comply with the new notice requirements, the commission disagrees with the first commenter, and believes that a computer program could perform much of the tracking necessary. Regarding the third commenter's flat fee suggestion to reflect actual costs, the commission disagrees, as these fee maximums are a ceiling that the industry cannot exceed. Property tax lenders are welcome to charge below these maximums to reflect actual costs. Furthermore, during the stakeholders meeting, the agency was informed that strong market forces would drive down the costs of closing. Consequently, the commission declines these comments.

The commission has considered the alternatives offered, but has not been provided compelling and statistically sound economic evidence to support either increasing or decreasing the fee maximums, or switching to a flat fee. Therefore, the commission declines to adopt the fee changes suggested by the commenters. Should more convincing economic information be discovered or presented in the future, the commission has the ability to revise the rule at that time. The maximum fee amounts may be revisited at a future date after the agency has had an opportunity to observe the industry.

"With regard to the maximum fee limits set out in §89.601(c)(2)," one commenter requests that "the rule . . . make provision for multiple properties." Each transfer constitutes a property tax loan for purposes of §89.601. The rule as proposed provides the property tax lender with a larger fee for a larger property tax loan. If property values increase, as in the case of multiple properties, then the allowable fees will rise as well. Considering the proposed fee structure already allows for a larger fee for multiple properties, the commission does not believe that any further provision is necessary on this issue.

Proposed subsection (d) of §89.601 provides a limited exception to the fee maximums, where a property tax lender may charge for attorney's fees "that are reasonable and necessary to establish in court the correct title to the property to which the property tax loan relates."

Two commenters request that the words "in court" be removed from proposed §89.601(d), one stating because the attorney's fees related to curative title issues for property tax loans often do not "require or even lend themselves to a proceeding 'in court.'" The other commenter has concerns over waiting for probate proceedings to be completed.

In contrast, two other commenters request that the exception allowing for any attorney's fees be removed from the rule completely. One commenter states: "We must continue to be mindful of the fact that this is a *property tax* loan and legal fees to correct title have no place whatsoever in a now private tax lien debt (as opposed to a governmental unit's tax lien) which the legislature has allowed as an exception to the homestead exemption against forced sale." (emphasis in original). The other commenter concurs: "The Texas Constitution allows foreclosure of homestead liens for payment of property taxes, not legal fees to resolve title issues." The commission agrees with the latter two commenters and finds their arguments persuasive. The agency finds further support of this view in caselaw. The tax lien that is transferred to a property tax lender against a homestead may only include indebtedness that the Constitution and the statutes authorized. Attorney's fees expended to clear title to a homestead do not constitute an authorized indebtedness to secure a property tax loan. Accordingly, the commission has removed subsection (d) from §89.601 for the adoption.

One commenter requests that an exception be added for the charging of hazard insurance premiums on the property. First, the commission believes that an exception for hazard insurance premiums is not within the scope of reasonable closing costs under Texas Tax Code, §32.06. And second, the commission understands that the first lien lender has the appropriate mechanisms to insure the property and would be in the best position to pick up the costs of hazard insurance premiums. Moreover, the person with the greatest risk is not the property tax lender, which should not need the benefit of hazard insurance. As a result, the commission declines to add an exception for hazard insurance premiums.

The new section is adopted under Texas Tax Code, §32.06(a-4) and (f-1), which authorize the Finance Commission to adopt rules to establish reasonable fees for property tax lenders.

The statutory provisions affected by the adopted new section are contained in Texas Tax Code, §32.06 and §32.065, and Texas Finance Code, Chapter 351, Property Tax Lenders, known as the "Property Tax Lender License Act" (Acts 2007, 80th Leg., ch. 1220, eff. Sept. 1, 2007).

§89.601. Fees for Closing Costs.

(a) Applicability. The fee limitations contained in this section are applicable to property tax loans secured by property designated as "Category A (Real Property: Single-Family Residential)," and homesteads designated as "Category E (Real Property: Farm and Ranch Improvements)" by the Property Classification Guide published by the Texas Comptroller of Public Accounts.

(b) Closing costs for which fees may be charged, contracted for, or received.

(1) Scope of closing costs. For purposes of this section, the term "closing costs" includes costs incurred by a property tax lender from the time of application through the time of closing.

(2) Examples of closing costs. The following is a non-comprehensive list of examples of closing costs for which a property tax lender may charge, contract for, or receive fees in connection with a property tax loan. Other law may limit the ability to charge these and other fees. Examples of some allowable fees for closing costs include the following:

(A) an application fee;

(B) an appraisal or inspection fee;

(C) a title examination fee;

(D) a property survey fee;

(E) a fee for flood and plat determinations;

(F) a document preparation fee;

(G) a closing or escrow fee;

(H) a fee for a tax certificate or tax payoff determination;

(I) a loan processing fee;

(J) an underwriting fee;

(K) a fee for obtaining credit reports;

(L) a fee for courier and delivery services.

(c) Total maximum fees for closing costs. For purposes of this section, the "total amount of money paid by a property tax lender to the taxing unit(s) to obtain transfer of the tax lien" will be referred to as the "total tax lien payment amount."

(1) Maximum fees include funds received by third parties or retained by property tax lender. The maximum fees provided for by this section encompass fees related to closing costs, whether the charge is paid by a property owner directly to a third party, paid to a third party through a property tax lender, or paid by a property owner directly to and retained by a property tax lender. A property tax lender may absorb any closing costs and may pay third parties out of the total compensation paid to it by a property owner.

(2) Maximum fee limits for closing costs. A property owner may not be charged, directly or indirectly, by a property tax lender an amount related to closing costs in excess of the amounts authorized by this section. A property tax lender may not directly or indirectly charge, contract for, or receive any amount related to closing costs from a property owner in excess of the amounts authorized by this section. The following subparagraphs contained in this paragraph outline the total maximum fees for closing costs that may be charged, contracted for, or received by a property tax lender in connection with a property tax loan, based on the total tax lien payment amount.

(A) For a total tax lien payment amount that is less than $2,500, the maximum fee for closing costs is $1,000.

(B) For a total tax lien payment amount that is equal to or greater than $2,500 but less than $5,000, the maximum fee for closing costs is $1,250.

(C) For a total tax lien payment amount that is equal to or greater than $5,000 but less than $7,500, the maximum fee for closing costs is $1,500.

(D) For a total tax lien payment amount that is equal to or greater than $7,500 but less than $10,000, the maximum fee for closing costs is $1,750.

(E) For a total tax lien payment amount that is equal to or greater than $10,000, the maximum fee for closing costs is $2,000, or 10% of the total tax lien payment amount, whichever is greater.

(3) Reasonable closing costs. The maximum fees contained in paragraph (2) of this subsection constitute "reasonable closing costs" under Texas Tax Code, §32.06.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Leslie L. Pettijohn
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For further information, please call: (512) 936-7611

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CHAPTER 90. CHAPTER 342, PLAIN LANGUAGE CONTRACT PROVISIONS SUBCHAPTER F. SECOND LIEN HOME IMPROVEMENT CONTRACTS (SUBCHAPTER G)

7 TAC §§90.602 - 90.604

The Finance Commission of Texas (commission) adopts amendments to 7 TAC §90.602, concerning Contract Provisions, §90.603, concerning Model Clauses, and §90.604, concerning Permissible Changes for second lien home improvement contracts.

The purpose of the amendments to these rules governing plain language contract provisions for Chapter 342 transactions is to implement changes required by recently passed legislation, and to make technical corrections. The amendments are adopted without changes to the proposal published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7808).

House Bill 1038 (HB 1038) was passed by the 80th Texas Legislature and went into effect on September 1, 2007. HB 1038 requires that two related disclosures concerning the Texas Residential Construction Commission (TRCC) be provided when certain registrations are required. The first notice, which we refer to as the "TRCC home improvement contract notice," must be provided for certain contracts where the total cost of home improvement is $10,000 or more, requiring the contract be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003. The second notice, which we refer to as the "TRCC builder notice," must be provided when the contractor is required to be registered with the TRCC.

Both notices must contain the contractor's certificate of registration number and direct the owner to contact the TRCC for complaints and inquiries. Revisions related to the TRCC disclosures are contained in §90.602(1)(N), (3)(V), and (5)(HH); §90.603(b)(14), (d)(22), and (f)(34); and the figures contained in 7 TAC §90.604(a)(12), (a)(14), and (a)(16). Please note that these disclosures are only required when the particular registrations are required, i.e., registration of the contract or of the builder. The rule text contained in §90.603 states that these disclosures may be omitted if the registration(s) are not required, resulting in the notices being inapplicable.

Another recent legislative change was also enacted during the 2007 session with the passage of House Bill 2061 (HB 2061). HB 2061 amends the Notice of Confidentiality Rights contained in Texas Property Code, §11.008, and now requires that this notice be included on any instrument transferring an interest in real property, whether or not any social security numbers or driver's license numbers are contained in the instrument. Thus, the commission is adopting revisions regarding the Notice of Confidentiality Rights reflecting the required nature of the notice as amendments to the rule text in §90.603(d)(24), and ad-

dition of the notice itself to the model contract contained in Figure 7 TAC §90.604(a)(14) for consistency purposes. This notice was returned to the other affected model contracts in a previous rule adoption. In addition, some technical corrections have been made throughout these rules, including renumbering.

These amendments as well as all of the rules contained in Chapter 90 provide model clauses and model contracts. Licensees are not required to adopt the model language contained in the rules. However, regarding §§90.101-90.604, for those licensees utilizing the model contracts, the prior model language (as contained in former 7 TAC, Part 1, Chapter 1, Subchapter Q) is acceptable and the agency will permit licensees to use the prior model language (without a non-standard contract submission) until January 1, 2008, to deplete supplies of existing forms during a transition period after the effective date of the rules. Please note that the publication of the adoption of previous amendments to §§90.105, 90.403, 90.404, 90.503, 90.504, 90.603, and 90.604 in the *Texas Register* on March 9, 2007, (32 TexReg 1232) listed the agency's implementation date as October 1, 2007. Given these additional adopted amendments as well as other recent changes, some required by recent legislation, the agency intends to provide licensees until January 1, 2008, for compliance.

The commission received no written comments on the proposal.

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions (as currently in effect) affected by the adopted amendments are contained in Texas Finance Code, Chapter 342.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 1. RETAIL RATES

16 TAC §25.239

The Public Utility Commission of Texas (commission) adopts new §25.239, relating to Transmission Cost Recovery Factor for Non-ERCOT Utilities with changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5594). The adopted rule establishes the mechanism by which an electric utility that operates solely outside of the Electric Reliability Council of Texas (ERCOT) in areas of this state included in the Southwest Power Pool (SPP) or the Western Electricity Coordinating Council (WECC) and that owns or operates transmission facilities can request annual recovery of its reasonable and necessary expenditures for transmission infrastructure improvement costs and changes in wholesale transmission charges, as allowed by §36.209 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §53.004 (Vernon 2007) (PURA). PURA §36.209, Recovery by Certain Non-ERCOT Utilities of Certain Transmission Costs, added by HB 989 of the 79th Legislature, Regular Session (2005) permits the commission, after notice and hearing, to allow an electric utility to recover on an annual basis its reasonable and necessary expenditures for transmission infrastructure improvement costs and changes in wholesale transmission charges to the electric utility under a tariff approved by a federal regulatory authority, to the extent that the costs have not otherwise been recovered. Further, §36.209 specifies that the commission may allow the electric utility to recover only the costs allocable to retail customers in the state and may not allow the electric utility to over-recover costs. This rule amendment is adopted under Project Number 33253.

A public hearing on the proposed section was held at commission offices on October 16, 2007. Representatives from the Alliance of Xcel Municipalities and the Cities Advocating Reasonable Deregulation (AXM & CARD); El Paso Electric (EPE); the Office of the Public Utility Counsel (OPC); Pioneer Natural Resources USA, Incorporated (Pioneer); Southwestern Electric Power Company (SWEPCO); Texas Industrial Energy Consumers (TIEC); and Xcel Energy Services, Incorporated on behalf of Southwestern Public Service Company (Xcel) attended the hearing. Representatives from AXM & CARD, Xcel, OPC, Pioneer, and TIEC provided oral comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments on the proposed new section from AXM & CARD, OPC, TIEC, SWEPCO, and Xcel. The commission received reply comments from AXM & CARD, EPE, OPC, Pioneer, TIEC, SWEPCO, and Xcel.

In addition to the proposed language, the commission requested that parties submit comments on the following questions:

(1) Should the commission establish a threshold for the establishment of a transmission cost recovery factor (TCRF)? If so, what should the threshold be?

(2) Should the commission establish a threshold for revision of the transmission cost recovery factor (TCRF) in which the approved transmission charges and transmission invested costs must exceed a set amount or have decreased by a set amount in order for the TCRF to be revised? If so, what should that threshold be?

(3) Should the rule specify whether increased revenue resulting from load growth should be considered in determining whether

the electric utility is recovering its transmission costs? Please explain.

Question 1

AXM & CARD, OPC, and TIEC recommended that a threshold be set for establishing an initial TCRF. In reply comments, SWEPCO and Xcel disagreed with the recommendation.

AXM & CARD commented that there should be a threshold for the establishment of a TCRF and that PURA makes recovery under §36.209 a matter of discretion, not an entitlement. They stated that a threshold amount would minimize the number of unnecessary proceedings and minimize the opportunity for over-recovery. In reply comments, SWEPCO disagreed and suggested that a threshold would specifically guarantee an under-recovery rather than minimize the chance of an over-recovery, contrary to the statutory directive. Additionally, because the statute limits the utilities eligible for these proceedings and limits the filings to one every 12 months, the establishment of a threshold as a means of achieving AXM & CARD's stated goal of minimizing the number of proceedings is unwarranted.

AXM & CARD stated that a utility should not be allowed to file an application under the proposed rule for a *de minimus* change in costs and wholesale charges, and suggested a threshold of 10% of the utility's gross transmission plant in service as determined in the utility's most recent general rate case. AXM & CARD stated that an electric utility should be eligible for rate relief under §36.209 only if the electric utility shows that its "Transmission Invested Costs" and changes in "Approved Transmission Charges" total an amount greater than 10% of the electric utility's base gross transmission plant in service or 10% of its annual transmission charges as determined in the utility's most recent base-rate proceeding, provided that its base rates have been set by the commission in a final order issued after December 2005. AXM & CARD offered an alternative if a threshold is not established, that affected customers and/or regulatory authorities be permitted to file an application for a change in a utility's TCRF. This proposal is discussed further in comments on subsection (f).

OPC commented that a threshold be set at a level that exceeds the correlating rate case expenses and reflects a material impact on the utility's revenues. OPC recommended that a threshold be set at the lesser of 10% of the revenue requirement of its transmission-related plant or four percent of its overall revenue requirement.

TIEC stated that it is appropriate to set a threshold for the establishment of an initial TCRF. TIEC suggested that the utility should demonstrate that changes in transmission charges and transmission investment costs exceed a certain percentage, such as 10%, of its transmission-related base rate costs as determined in its last rate proceeding. Additionally, TIEC recommended that the utility also demonstrate that it is not currently earning its commission-authorized rate of return on common equity (ROE) as reported in its most recent Earnings Monitoring Report filing with the commission. TIEC stated that this would reduce controversy and assist the commission in ensuring that recovery through the TCRF mechanism is justified.

Xcel replied that a 10% threshold is outside the bounds of HB 989 and is inequitable for each non-ERCOT utility because levels of transmission investment will vary from company to company.

SWEPCO and Xcel did not support a threshold requirement and noted that there was not a materiality threshold set forth in the statute. In reply comments, EPE agreed.

SWEPCO commented that a threshold would unnecessarily delay the recovery of necessary transmission infrastructure investments and appears to be contrary to the public benefit language in the proposed rule. SWEPCO stated that the intent of the statute was timely recovery of reasonable and necessary changes in wholesale transmission charges much like what is currently allowed for ERCOT utilities.

Xcel commented that in enacting House Bill 989, the Legislature did not specify a threshold to establish the TCRF. In reply comments, EPE agreed. Xcel did not believe a threshold was required and listed the following reasons why the commission should not establish a threshold:

- Establishing a threshold requirement would undermine the underlying purpose of HB 989 to encourage timely investment in non-ERCOT transmission infrastructure.

- Establishing a threshold requirement gives a utility an incentive to delay construction or upgrades of transmission facilities until the need justifies an outlay higher than the threshold.

- Setting a threshold requirement that would be fair for all of the non-ERCOT utilities would be difficult.

- Setting a threshold requirement is unnecessary because the administrative costs associated with filing a TCRF proceeding, revising the utility's tariffs, and changing the billing systems will effectively deter minor adjustments to transmission cost recovery rates.

- Allowing a utility to add transmission investment on an incremental basis without establishing a threshold allows for rates to increase gradually.

- Requiring a utility to satisfy a threshold and then placing the entire investment amount in rate base could lead to rate shock for retail electric providers and end use customers.

- There is no rational basis to establish a threshold for non-ERCOT utilities when ERCOT utilities do not have that requirement, and the need for new transmission is as acute outside ERCOT as it is in ERCOT.

In reply comments, EPE agreed that administrative costs will act as a deterrent to *de minimus* adjustment filings.

SWEPCO agreed with Xcel that establishing a threshold would "undermine the underlying purpose of HB 989, which is to encourage timely investment in non-ERCOT transmission infrastructure."

OPC replied that the position of SWEPCO and Xcel on the threshold is illogical and unreasonable and stated that a threshold is a practical acknowledgement that a change in a utility's investment costs should be significant before resources are incurred by all parties and ensures that the utility does not over-recover.

TIEC expressed concern about Xcel's suggestion that establishing a threshold would create an incentive to delay the construction or upgrades of transmission facilities. As regulated monopolies, electric utilities have an obligation to serve their customers and construct needed transmission infrastructure. TIEC commented that establishing a threshold for TCRF recovery does not deny recovery, but ensures that such recovery of costs between rate cases is justified. TIEC also disagreed that the absence of

a threshold would result in smaller increases and thus avoid rate shock. A desire to implement rates gradually does not justify allowing a utility to initiate recovery through a TCRF where such recovery is not necessary and will likely be outweighed by the administrative burden of managing and overseeing the TCRF mechanism.

Commission response

At this time, the commission does not find sufficient justification to warrant the establishment of a threshold. The commission expects that the administrative costs of obtaining and administering a TCRF will serve as an adequate deterrent to applications to revise TCRFs for small amounts. Therefore, the commission declines to establish a threshold for setting the TCRF.

Question 2

AXM & CARD and OPC recommended that a threshold be set as a criterion for revising a TCRF.

AXM & CARD commented that there should be a threshold so that the commission and affected persons do not have a hearing over minor changes and referred to the reasons detailed in their comments in response to question one.

OPC referred to its comments in response to question one.

TIEC commented that, if the rule is properly designed, a threshold for revision would not be necessary. By limiting the revenue requirement as defined in the rule, a utility would not be able to seek recovery of costs that have been otherwise recovered. However, if after implementing a TCRF, the utility is found to be earning in excess of its last authorized ROE, then the TCRF should be reduced to eliminate the excess earnings. TIEC stated that it is essential that the utilities use updated billing determinants as provided in the rule and that a requirement for updated allocation factors should be added to the rule. If a particular class of customers experiences a substantial increase or decrease in growth, out-of-date allocation factors may not accurately reflect these class differences. Without updated allocation factors, some delivery classes may experience either large increases or decreases in transmission cost responsibility in subsequent rate cases because the allocation factors were not changed in the TCRF. TIEC stated further that, if the billing determinants are updated, but the allocation factors are not, there will be a mismatch in the rate design and at a minimum, the updated allocation factors should reflect the corresponding changes in the updated billing determinants. TIEC stated that a mechanism to adjust the allocation factors has been used in the SWEPCO Purchased Power and Conservation True-Up Case and that a similar approach could be developed.

SWEPCO and Xcel commented that the commission should not establish a threshold for revision of a TCRF for the reasons set forth in their response to question one. However, if a threshold is established, Xcel commented that it should be applied symmetrically to decreases as well as increases.

Commission response

At this time, the commission does not find sufficient justification to warrant the establishment of a threshold for amending a TCRF. The commission expects that the administrative costs of amending a TCRF will serve as an adequate deterrent to TCRFs for small amounts. In addition, the rule limits the utility's ability to request amendments to no more than one each calendar year.

Question 3

AXM & CARD, OPC, Pioneer, and TIEC commented that load growth should be considered.

AXM & CARD commented that §36.209 states that the commission may allow an electric utility to recover, on an annual basis, its reasonable and necessary expenditures for transmission infrastructure improvement costs and changes in wholesale transmission charges to the electric utility under a tariff approved by a federal regulatory authority "to the extent that the costs or charges have not otherwise been recovered," and that the commission "may not allow the electric utility to over-recover costs." AXM & CARD stated that absent recognition of load growth, the utility could easily over-recover, as it could experience growth in sales sufficient to offset any need for rate relief to recover new investment in transmission facilities. AXM & CARD commented that the commission "must" determine whether the utility is recovering costs through any other means, including reviewing the utility's sales to determine if the utility is producing sufficient revenue to recover costs incurred to build transmission infrastructure improvements. AXM & CARD stated that, without evaluating growth in load and associated revenue, it will be difficult to ensure the utility is not otherwise recovering any incremental increase in costs it may experience as a result of implementing transmission infrastructure improvements. Additionally, increases in cost may be accompanied by an increase in revenue from increased sales, either in terms of greater sales to existing customers, or an increase in the number of customers served, or both. AXM & CARD added that the rule should also include a mandatory true-up provision at least every three years. In oral comments; OPC agreed with AXM & CARD that a true-up is needed for wholesale transmission costs.

In oral and written comments, OPC commented that the rule should consider the load growth component. OPC stated that, in a rate case, a utility's rates are based on recovering its costs based on an assumed level of sales. Because the level of sales is increased by load growth, failing to account for these excess revenues would result in an over-recovery of the utility's costs. OPC referred to *Entergy Gulf States v. P.U.C.*, 173 S.W.3d 199, 210 (Tex. App. Austin, 2006 pet. denied), and stated that the commission should similarly recognize that revenues arising from a utility's load growth are available to recover a utility's new transmission costs. Failure to consider these revenues leads to double recovery of a utility's costs contrary to §36.209. OPC recommended that the commission provide for the consideration of a utility's load growth in a TCRF proceeding.

Xcel replied that the proposed rule addresses the load growth issue through the true-up process described in subsection (f). Xcel and SWEPCO argued that the impact of load growth will be taken into consideration when the TCRF is calculated under subsection (d). Xcel added that the use of current billing determinants should adequately account for load growth, and the use of the proposed three-year true-up should assure interested parties that load growth and other components are accurately reflected in the TCRF. Xcel stated that the case that OPC referred to has no bearing on this issue. In that case, the court concluded that load growth might have led to additional revenues beyond those expected when rates were set, because the utility had sold more electricity than anticipated. In contrast, the proposed rule prevents additional revenues attributable to load growth from accruing to the utility's benefit because the true-up mechanism in subsection (f) requires a refund if the TCRF leads to over-recoveries of incremental transmission investment. SWEPCO and Xcel commented that no additional language regarding load growth

is necessary. EPE agreed and stated that the use of updated billing determinants sufficiently addresses the issue.

SWEPCO commented that the rule should be patterned as closely as possible on the rules governing Transmission Cost of Service recovery and TCRFs in ERCOT. SWEPCO added that transmission cost is incurred to accommodate generation changes inside and outside a utility's system and not just for load growth on the transmission system. SWEPCO stated that the revenue requirement calculation also allows for adding the FERC-approved incremental transmission charges and administrative fees, which may relate to transmission facilities owned and operated by another transmission service provider.

Xcel commented that load growth is taken into account in the true-up process in proposed subsection (f) and that by comparing actual collections to the intended revenues, any other over-earnings due to load growth will be captured automatically. To be certain that load growth and other components are accurately reflected in the TCRF, Xcel proposed that the commission require electric utilities to update the TCRF at least every three calendar years. OPC, Pioneer, and SWEPCO agreed with the proposed three-year true-up. AXM & CARD also proposed a three-year true-up.

TIEC stated that load growth is an important consideration in determining whether the utility is recovering transmission costs. Every additional kW or kWh sold generates additional base rate revenues. Growth in base revenues will offset some, or possibly all, of the incremental investment and, therefore, a utility's investment in additional transmission does not necessarily mean that a utility's base rates must be increased. TIEC commented that the proposed rule addressed this concern to some extent by dividing the incremental revenue requirement by the current billing determinants. The use of current billing determinants should adequately account for load growth. However, if the customer classes do not grow uniformly, the impact to specific customers will be different. TIEC stated that this is another reason to adjust the allocation factors to parallel the change in billing determinants.

In reply comments, Pioneer agreed that load growth and other factors that affect cost and offsetting revenue should be considered. Without this determination, it is impossible to determine whether the utility is over or under-recovering.

TIEC disagreed that the load growth is taken into account in the true-up process described in proposed subsection (f) and stated that both the billing determinants and the allocation factors must be updated each time a TCRF mechanism is established. TIEC stated that a rate is determined by dividing the costs (numerator) by the billing determinants (denominator) and that the lower the denominator is, the higher the rate will be. Thus, if updated billing determinants are not used, the utilities' requested charges will most likely be overstated. The same logic applies to updating the allocation factors. TIEC commented that the use of out-of-date allocation factors may not reflect the variances in growth by customer classes, and updating billing determinants without also updating allocation factors will lead to an imbalanced rate design.

In reply comments and oral comments, OPC disagreed with Xcel and SWEPCO that the true-up would address the issue of load growth. OPC stated that the utilities failed to distinguish between revenue requirement and rate design issues. The most recent billing data needs to be used both in the revenue requirement and rate design phases of a TCRF application. OPC stated that SWEPCO's position would simply divide an excessive revenue requirement with the most recent billing determinants and that the excessive revenue requirement would still exist. The true-up would focus on whether the revenues obtained by the TCRF exceed the revenue requirement established by the commission and would not address the excessiveness that the revenue requirement caused by failing to consider load growth. Additionally, the true-up could result in a refund but would not necessarily result in an adjustment going forward.

Commission response

The commission finds that the proposed calculation properly accounts for load growth for the purpose of the TCRF. The commission concludes that it is not necessary or appropriate to require that the calculation of the TCRF account for growth in overall revenue as a means to reduce the amount of transmission costs eligible for recovery through the TCRF. To do so would undermine the underlying purpose of HB 989 to encourage timely investment in non-ERCOT transmission infrastructure. In addition, such an approach would not recognize that non-transmission costs could be growing faster than the increased revenues. Increases in load, revenue and non-transmission costs should be addressed through a general rate case.

Subsection (b)(1)

TIEC stated that the definition of approved transmission charges includes the recovery of administrative fees. TIEC observed that it is not appropriate to allow the recovery of all administrative fees through the TCRF because not all administrative fees are entirely transmission-related. At least some portions of administrative fees are attributable to generation. Regional Transmission Operator (RTO) functions include generation-related functions such as scheduling and settlement. TIEC added that ERCOT utilities are not allowed to recover the ERCOT administrative fee through the TCRF mechanism. OPC agreed. SWEPCO agreed that only transmission-related administrative fees should be recovered through the TCRF.

Commission response

The commission agrees that the TCRF should recover only transmission-related fees and clarifies the definition as it pertains to administrative fees accordingly.

Subsection (b)(2)

AXM & CARD urged the commission to modify the definition of transmission invested costs to specify a minimum voltage level transmission facility and stated that utilities in ERCOT use 60 kilovolts (kV) and above, to classify facilities as transmission facilities. Xcel agreed. SWEPCO suggested that the RTO's definition of transmission facilities should be used.

Commission response

The commission notes that "transmission line" and "transmission system" are currently defined in P.U.C. Substantive Rule §25.5, relating to Definitions, which applies to this rule. Both definitions refer to lines or facilities operated at 60 kV or above. Therefore, the rule establishes a clear definition of transmission facilities. While this definition may differ from the RTOs' definitions of transmission facilities, the commission concludes that a simple definition based on the voltage of the facilities is appropriate for the purpose of the TCRF proceeding. Accordingly, a change to this rule is unnecessary.

AXM & CARD stated that the formula for determining the revenue requirement should be based on the utility's total

net transmission plant, not just the increase in plant for new facilities. Otherwise, the utility would likely over-recover its costs as depreciation and retirement related to existing transmission facilities could more than offset the increased net investment in new facilities. AXM & CARD commented that the revenue requirement should reflect the reduction in costs that accompanies a plant that has been retired, as well as ongoing depreciation. They stated that, because the statute prohibits over-recovery, the commission must take this into account regardless of whether it is in the formula or not. Additionally, AXM & CARD stated that utilities within SPP receive transmission revenues from SPP, which should be included in the calculation of revenue requirement as transmission-related miscellaneous revenue credits. AXM & CARD further stated that the revenue requirement formula should recognize a utility's load growth to safeguard against over-recovery by the utility.

OPC commented that the rule should address the rate impact of the retirement of facilities that decrease a utility's costs and stated that the current rates may be otherwise recovering the utility's improvement costs. Therefore, OPC recommended the proposed rule provide for transmission cost offsets caused by plant retirements.

Commission response

The commission agrees with AXM & CARD and OPC that the reduction in invested capital because of retirement and depreciation of facilities should be accounted for and amends the definition of Transmission Invested Costs accordingly. The issues of load growth and other revenues are addressed above.

AXM & CARD requested that the rule specify the Federal Energy Regulatory Commission (FERC) transmission plant accounts that may be included in a TCRF. AXM & CARD further commented that the rule should limit recovery to those costs "that are appropriately allocated to Texas retail customers," consistent with the statute, which specifies "[t]he commission may allow the electric utility to recover only the costs allocable to retail customers in the state . . ." in §36.209(b). Xcel agreed that the appropriate FERC accounts should be specified. SWEPCO suggested that the appropriate FERC accounts are 350-359.

Commission response

The commission agrees and amends the definition accordingly. Proposed subsection (e) limited recovery to amounts that are appropriately allocated to Texas retail customers; no change is necessary to address this issue.

Subsection (d)

AXM & CARD commented that the class allocator used in the TCRF formula should not be more than five years old, or it could become out of sync with the customer classes' cost responsibilities. They recommended that the utility be required to file new or revised allocation factors if the class allocator is more than five years old. TIEC commented that the class allocator should be updated each time a utility seeks to revise its TCRF based on class information for the previous calendar year. OPC replied that it was not adverse to the comments of AXM & CARD and TIEC regarding updating the class allocation factors.

In reply comments, SWEPCO and Xcel disagreed with TIEC. SWEPCO stated that class allocation has traditionally been a hotly contested issue in rate proceedings. Updating such allocators in an administrative proceeding would be problematic. SWEPCO stated that the class allocators are not updated under the ERCOT transmission cost recovery mechanisms and maintained that the allocation factors from the most recent rate case be utilized in the TCRF calculation. Xcel also commented that allocation factors will not change very much from year to year, and re-litigating those allocation factors in every TCRF proceeding would defeat the efficiency that §36.209 was designed to promote.

Commission response

The commission finds that amending class allocation factors is typically a highly contested issue and that for the purpose of this proceeding, the existing class allocation factors should be sufficient to produce a fair allocation of costs, while permitting the cases to be resolved in a reasonable timeframe. Therefore, the commission declines to amend the rule as requested.

Subsection (e)

OPC stated that the proposed rule does not consider when a utility may be earning revenues in excess of its earnings requirement established under the utility's last base rate case. The increased revenues could result in the utility over-earning under its current rates. OPC stated that setting a TCRF without considering such excess revenues would result in allowing the utility to double recover its costs, which would be contrary to §36.209. OPC recommended that the commission include language in the proposed rule prohibiting a utility from increasing its TCRF when its revenues exceed its revenue requirement. EPE disagreed and stated that the commission already has proceedings for reviewing and evaluating required annual earnings reports. EPE stated that the over-recovery language in §36.209 is not targeted to over-recovery of costs other than transmission costs.

Xcel disagreed with OPC's proposal and commented that to the extent OPC refers to TCRF revenues only, the true-up in proposed subsection (f) will prevent an over-recovery. Therefore, OPC's concern is unwarranted. However, if OPC is referring to the utility's overall revenues and revenue requirements, the proposed language should be rejected. Xcel stated that there is no such requirement for ERCOT utilities, that it is impractical and illogical and that it is rare for a utility to earn exactly its authorized rate of return. Therefore, a utility will almost always be over-earning or under-earning by some amount. There is nothing in §36.209 or its legislative history to suggest that the non-ERCOT TCRF should be limited to those utilities that can show they are under-earning. Xcel also stated that it is unnecessary because the commission reviews the utilities' Earnings Monitoring Reports and calls utilities in for rate cases if the reports indicate over-earning.

Commission response

Like the commission's findings above concerning load growth, the commission finds that the appropriate method to address over-earnings in the context of the utility's overall revenue requirement is for commission staff to monitor the Earnings Monitoring Reports and to initiate a rate review of the company if appropriate.

SWEPCO stated that each of the non-ERCOT utilities is differently situated with respect to the reliability council within which it operates and its transmission cost structure; therefore, the use of a single TCRF-RR is complicated. SWEPCO used the example that while all of SWEPCO's transmission service is taken and charged under the SPP Open Access Transmission Tariff (OATT), only a portion of Southwestern Public Service's transmission may fall under the SPP OATT. Additionally, the SPP and WECC utilize different methodologies for the allocation

of costs related to transmission improvement costs to each member. However, SWEPCO stated that the proposed calculation would enable recovery of its transmission-related charges and investments. Because all of SWEPCO's transmission service is taken and charged under the terms of the SPP OATT, SWEPCO plans to make use of this calculation by submitting a value of zero in the 'revreqt' portion of the formula. SWEPCO's retail customers would only be allocated their jurisdictional share of any FERC-approved transmission-related costs charged to SWEPCO by the SPP.

TIEC expressed concern that SWEPCO would essentially recover all of its transmission investment through the "Approved Transmission Charges" portion of the formula. TIEC stated that the commission must fulfill its obligation to ensure that SWEPCO's costs and charges are reasonable and necessary and have not been otherwise recovered, and the rule language should be written in a way that follows the statute and ensures that improper costs are not recovered from ratepayers.

SWEPCO stated that PURA directs that the utility be allowed recovery of transmission charges under a tariff approved by a federal regulatory authority. Consequently, SWEPCO argued that there is no need for a true-up in which costs will be reviewed for reasonableness and necessity because that has already occurred. In reply comments, EPE agreed and stated that any determination by the commission that costs approved under an FERC-approved RTO tariff are not reasonable and necessary is contrary to the filed rate doctrine, and there would be no basis for subsequently ordering a refund of such costs. Further, EPE stated its position that the PUC should not attempt to "double true-up" the revenues recovered under the TCRF. It is sufficient that, when the plant additions are reviewed by the commission if additions are determined not to be reasonable and necessary, revenues received due to those additions being used in the TCRF formula would need to be refunded. EPE stated that this approach, combined with the annual earnings monitoring process, adequately addresses the statutory prohibition on over-recovery in a manner more consistent with traditional rate-making principles. No additional layer of matching of actual revenues to the projected revenues used in the TCRF formula is required by the statute.

AXM & CARD disagreed, because §36.209 prohibits the commission from allowing a utility to over-recover either costs or charges it may pay under a federally-approved wholesale tariff for transmission service. Additionally, according to AXM & CARD, it is unclear whether the charges included in the SPP OATT have been reviewed for "reasonableness and necessity." AXM & CARD urged the commission to retain the provision that applies a true-up requirement to charges paid under a wholesale tariff, particularly where it cannot be shown that costs included in such a tariff were not subject to a thorough review.

Commission response

The commission's proposed rule has been drafted in accordance with the statute. The calculation appropriately recovers tariffed transmission costs. The commission concludes that the true-up is not contrary to the filed rate doctrine. The purpose of the true-up is to ensure that Texas retail customers are not over-charged for transmission costs incurred by a utility. The filed rate doctrine may affect the commission's authority to deny recovery of costs that a utility has incurred under a tariff approved by the FERC, but it does not affect the procedures that the commission adopts for the review of those costs or its authority to preclude a utility from recovering from Texas retail customers more than their share of the costs the utility has incurred under the FERC tariff.

TIEC stated that, consistent with the requirement that recovery of costs be limited to those that are appropriately allocated to Texas retail customers, the ALLOC component of the revenue requirement should be updated each time a utility seeks to revise its TCRF based on jurisdictional retail allocation information for the previous calendar year. SWEPCO replied that, in ERCOT, the only time the allocation table is updated is during a general rate review when the transmission allocators are updated. Therefore, each time the TCRF filing is made, the allocation table remains the same and only the billing units are updated during the TCRF filing. SWEPCO requested the commission apply the same practice to non-ERCOT TCRF filings.

Commission response

The commission finds that amending jurisdictional allocation factors is typically a highly contested issue and that, for the purpose of this proceeding, the existing jurisdictional allocation factors should be sufficient to produce a fair allocation of costs. Therefore, the commission declines to amend the rule as requested.

Xcel commented that, in the proposed TCRF revenue requirement formula, a 10% cost of equity is used if more than three years have elapsed since the utility's last base rate case. Xcel suggested that 10.5% is more in line with the financial demands associated with investment in new transmission infrastructure, including the need to maintain a strong credit rating during a period of capital investment, which is necessary to effectively finance the investment. Xcel stated that the credit rating is influenced by the ROE. Additionally, a slightly higher cost of equity reflects the need to provide returns that are sufficient to meet the commission's policy goal of encouraging greater investment in transmission, while recognizing the challenges of a competitive environment for new capital dollars to invest in the transmission sector. Xcel acknowledged that the proposed rulemaking facilitates more timely cost recovery, but stated that there is still an inherent lag in recovery that suppresses the ultimate return. Xcel stated that setting a slightly higher permitted rate of return facilitates a more reasonable level of actual recovery. Xcel based its value of 10.5% on its assessment that the median ROE authorized by the commission has been around 10.9% in recent delivery-type proceedings in Texas.

TIEC, AXM & CARD, and OPC requested that the commission reject Xcel's suggestion. OPC stated that Xcel's argument is not supported with an appropriate comparison, as it relies on delivery-type proceedings for different utility structures. TIEC stated that Xcel provides no citation for the claim that the commission-authorized Texas median ROE is 10.9%, which is higher than what other reports would show and higher than contemplated in recent commission proceedings. TIEC stated that the development of a TCRF mechanism would lower utilities' risk by reducing regulatory lag, which should translate into a lower ROE. TIEC commented that setting a 10% proxy is more than reasonable. TIEC suggested that because the rule will likely be in place for some time, it is sensible to establish a conservative ROE, perhaps even lower than 10%. TIEC noted that the 10% ROE is only a proxy if a utility has not had a rate case within three years. AXM & CARD stated that a company's ability to attract capital is not evaluated by the capital markets on an asset-by-asset basis, but rather, on the level of risk a company faces in being able to recover the investment over a reasonable period. AXM & CARD commented that 10% is consistent with what the commission has been approving in recent cases and

that, in light of recent actions by the Federal Reserve Board, the cost of capital should be decreasing, not increasing. Additionally, SPS is a wholly-owned subsidiary of Xcel Energy, and Xcel's cost of equity is influenced more by overall operations than by SPS's investment in transmission facilities. AXM & CARD added that, if investment in transmission lines is what the market is demanding, then there is even less risk associated with that type of investment because the likelihood of a disallowance from rate base of transmission assets is even more remote. AXM & CARD concluded that there is no basis for a premium ROE for transmission investments.

Commission response

For the reasons cited by TIEC, AXM & CARD, and OPC, the commission concludes that a 10% cost of equity is appropriate. This rate is reasonable given that the TCRF mechanism reduces regulatory lag and provides more timely recovery of costs. Moreover, the 10% figure is used as a proxy rate only in situations where the utility has not had a rate case within three years. With respect to Xcel's assertion that the median ROE authorized by the commission in recent delivery-type proceedings has been "around 10.90%," the commission, since the unbundled cost-of-service cases in 2000, has in fact specifically determined an ROE in only one investor-owned rate proceeding--Docket Number 33734. In that proceeding, the commission authorized an ROE of 9.96%, a rate that is consistent with the 10% figure included in the rule. Accordingly, no change to the rule has been made.

Subsection (f)

AXM & CARD and TIEC recommended that a utility's TCRF should be rolled into base rates in the utility's next general rate case. OPC recommended that the TCRF be an interim measure between rate cases. SWEPCO and Xcel did not object. SWEPCO suggested that the rule allow for updates, specifically in the SPP OATT, to be included in base rates up to the time that the compliance rates are approved in a rate case, instead of the filing date of the rate case. This would allow for all transmission costs in base rates, leaving zero in the TCRF, and providing for a seamless transfer of costs from the TCRF to base rates.

Commission response

The commission agrees with parties that the TCRF should be an interim measure between rate cases and amends the rule accordingly. How charges under an OATT are updated in a general rate case is an issue that is beyond the scope of this rule.

AXM & CARD requested that the provision of the rule permitting commission staff to file an application to amend a utility's TCRF be expanded to include affected customers and any regulatory authority. Such an expansion would provide for checks and balances against over-recovery by the commission. OPC and Pioneer agreed. OPC requested that it be specifically added to the list of those who can request a change. SWEPCO urged the commission to reject this proposal and noted that this process is not allowed for in TCRF proceedings for ERCOT utilities. Further, the commission has available to it the Earnings Monitoring Reports, which can be reviewed to determine if the utility is over-earning; and the commission has traditional remedies available to it in the event it determines that over-earnings have occurred. SWEPCO added that this proposal is contrary to AXM & CARD's stated goal to minimize the number of proceedings. Xcel also disagreed and stated that the commission staff has the right and duty to monitor the TCRF, and commission staff will apply to reduce the TCRF when it is too high. Further, should commission staff fail to do so, the true-up provision in proposed subsection (f) will protect customers from over-recovery. In the public hearing, AXM & CARD stated that the true-up in subsection (f) was not sufficient because commission staff may have other priorities.

Commission response

The commission finds that the provisions allowing commission staff to file an application to amend the TCRF, the true-up provisions included in the rule, and the commission staff's monitoring of Earnings Monitoring Reports are the appropriate mechanisms for addressing potential over-recovery. Allowing customers to initiate reviews of the TCRF would create additional uncertainty about the recovery of transmission costs by affected utilities, which is inconsistent with the broad purpose of the rule. Therefore, the commission declines to amend the rule to allow customers to petition for a revision to the TCRF.

Xcel requested that, regardless of who has the right to apply to adjust the TCRF, the rule clarifies that another party's application to adjust the TCRF does not prevent a utility from bringing its own application to adjust the TCRF the same calendar year. Xcel noted that the statutory language specifies only that the electric utility may not apply to amend the TCRF more frequently than once a year, not that the TCRF may only be amended once a year. Xcel stated that there could be regulatory lag if this is not allowed and provided the example that, if commission staff successfully applied to reduce the TCRF in February of one year, and the utility placed a large new transmission facility in service in June of that year, the utility would not be able to apply for an adjustment until January of the next year.

Commission response

The proposed rule provided that the utility may file for a TCRF revision once a year, irrespective of whether the commission staff files for an amendment to the TCRF. Therefore, no change is necessary.

OPC commented that the rule provides for a refund if the commission finds an over-recovery under a utility's TCRF, but does not require a utility to file to amend its TCRF when the utility is over-recovering. OPC recommended that a utility be required to file to adjust its current TCRF if its current TCRF is over-recovering under the TCRF. Pioneer agreed.

Commission response

The commission finds that the rule provisions regarding the commission staff petition, refund, and proposed three-year true-up are sufficient mechanisms to address potential over-recovery and declines to amend the rule as requested by OPC.

Xcel stated that the ERCOT TCRF has no true-up mechanism to calculate over and under-recoveries, and the commission specifically rejected such a mechanism when it was proposed. Xcel and SWEPCO submitted that it was inequitable to require a utility to refund an over-recovery of transmission investment but not to allow the utility to be made whole for an under-recovery under the TCRF. Xcel recognized that §36.209 prohibits over-recovery, but stated that PURA also allows a utility to recover its reasonable and necessary operating expenses which include transmission investment costs. Xcel commented that there is no logical reason to force a utility to file a base rate case to make up for prior under-recoveries of transmission investment.

SWEPCO argued that TCRF rates are not interim rates, so there should not be a true-up to the requested revenue requirement;

and revenues requested under this TCRF should be given the same treatment as the ERCOT TCRF. Whether the final rates recover the costs they were designed to recover is part of the regulatory risk that a utility bears. EPE replied that, if the commission imposes the additional layer of revenue matching discussed previously in comments, it should allow for true-up of under-recoveries as well as over-recoveries. OPC disagreed and stated that the commission's proposed true-up provision correctly implements §36.209(b).

Commission response

The statutory language regarding the recovery of non-ERCOT transmission infrastructure improvement costs explicitly prohibits over-recoveries, but does not explicitly require a provision for under-recoveries. Therefore, the commission finds it necessary for the rule to require a refund of such over-recoveries. There is no equivalent provision in the statute pertaining to the recovery of ERCOT transmission costs, so the analogy to ERCOT TCRFs is not entirely on point.

SWEPCO requested that the rule include an administrative schedule to provide all interested parties some certainty and clarity as to the process by which each of the different methodologies will be approved and suggested language that would result in an order within 45 days or an interim rate following the 45 days if an order is not issued.

Xcel commented that a more specific procedural process would beneficial. Xcel believed that the purpose of having a TCRF is to allow transmission rates to reflect incremental transmission investment without the necessity for a lengthy and complicated base rate proceeding. An abbreviated schedule giving the utilities the opportunity to begin recovering transmission investment within 90 days after the application is filed will encourage new transmission investment. Xcel commented that the scope of the hearing should be limited to the application of the formula in the rule, the extent of any prior over-recovery or under-recovery, and the terms on which the previous over-recovery or under-recovery will be returned to, or recovered from, ratepayers. Xcel stated that it is unnecessary to delve into the prudence of a project or the reasonableness of the costs expended in the project because it will be litigated in the utility's next base rate case, and the utilities will file periodic monitoring reports on revenues from the TCRF. SWEPCO had no objection to the use of Xcel's proposed schedule.

EPE agreed with Xcel's recommendation regarding the scope of the proceeding and stated that the approach would be consistent with the purpose of the statute by tending to encourage the transmission investment by simplifying the TCRF proceeding without depriving the commission, commission staff, or other parties the eventual opportunity to review the reasonableness and necessity of the transmission costs at issue. EPE supported both the 45 and 90-day proceeding provisions.

AXM & CARD, OPC, Pioneer, and TIEC disagreed with the procedural schedules proposed by SWEPCO and Xcel. AXM & CARD stated that §36.209 does not limit the time the commission has to conduct a proceeding. The legislative history of the bills that ultimately resulted in §36.209 belie the notion that a "quick" proceeding was contemplated. The initial bill related to recovery of transmission costs and called for an expedited mechanism without a hearing. That version was not adopted. However, if a timeframe is given, AXM & CARD suggested a time period of 135 days from beginning to end, with a provision for expedited discovery and a requirement that the utility fold its TCRF into its base rates at least every three years in a general rate case. AXM & CARD further disagreed with the scope limit proposed by Xcel, because it would violate the requirement that the commission not allow a utility to over-recover its costs. Looking at only parts of the utility's rates could lead to over-recoveries; therefore, the scope should be sufficiently broad to allow review of all transmission related costs and all revenue sources. Further, AXM & CARD stated that the schedule proposed by SWEPCO is unworkable, as both a seven-day timeframe to approve a schedule is insufficient; and a 45-day approval period, even interim, is insufficient to conduct any review. AXM & CARD submitted that the commission should address scheduling issues on a case-by-case basis. Additionally, an interim approval should not be the default mode.

OPC did not object to a procedural schedule, but stated that 90 days would be insufficient for parties to review and meaningfully participate in the proceeding. OPC stated that the application will probably be as extensive as a fuel reconciliation proceeding whose jurisdictional time limit has been set by the commission at a year. OPC recommended a one-year schedule.

Pioneer stated that a 45-day schedule is too short to allow affected parties to meaningfully evaluate the application, lodge a protest, or propose changes. Pioneer suggested a minimum 90-day schedule and stated that the rule should give the examiner the discretion to extend the schedule. Pioneer stated that, if an order cannot be issued within 90 days, interim implementation on the 90th day, similar to SWEPCO's 45-day proposal, would be reasonable. In the public hearing, Pioneer requested that the commission ensure that customers have the opportunity to participate in this proceeding. In the public hearing, Xcel suggested that 90 days was sufficient time for a hearing and that the commission may consider requiring testimony up front so that discovery can begin immediately.

TIEC disagreed with the procedural schedules recommended by Xcel and SWEPCO because they provide too little time to adequately review the costs and charges submitted for recovery by the utility to ensure compliance with the statutory mandate. TIEC noted that the process suggested by Xcel appeared to be based on the commission's procedure for processing fuel factor adjustment cases set forth in P.U.C. SUBST. R. §25.237, relating to Fuel Factors, and observed that this is based on a different statutory framework which does not require a hearing. TIEC stated that the flexible structure allowed by §36.203, which limits the commission's review to approving, disapproving, or modifying the adjustment to the fuel factor, is not comparable to §36.209, permitting the commission to allow recovery of costs and charges only after notice and hearing and only if they have not been otherwise recovered. TIEC commented that adopting Xcel's proposal could result in double recovery since the commission would be unable to determine whether they have been recovered and that a later true-up would not alter this.

Commission response

The commission finds that the establishment of a procedural schedule is not warranted at this time. Each utility will have different levels of costs that will need to be reviewed in the initial TCRF filings and the procedural schedule should be set to reflect the amount of time needed for an appropriate review. In addition, because of the requirements for notice and hearing before commission approval of the recovery of reasonable and necessary transmission expenditures, the commission interprets §36.209 to require a determination of the reasonableness and necessity of the transmission expenditure before they are recovered

through the TCRF. As a result, a non-ERCOT TCRF proceeding is not analogous to a fuel factor proceeding in which issues of reasonableness and necessity of expenditures are deferred until a subsequent fuel reconciliation proceeding.

AXM & CARD stated that this section, as proposed, states that the utility may file an annual TCRF case and that to minimize the chance that a utility will over-recover its cost, it should be required to submit a "true-up" filing no later than every three years since its last application for approval of a TCRF.

Xcel recommended that the true-up provision previously discussed in comments in response to question three be placed in subsection (f) and recommended language for its suggestion.

Commission response

The commission agrees with both of these comments and amends subsection (f) accordingly.

Subsection (g)

AXM & CARD stated that the proposed rule provision providing that the commission "may" develop forms for a TCRF application and monitoring revenues from a TCRF should be modified and that forms should be mandatory. AXM & CARD commented that the use of a standard form would expedite the production of data in support of the utility's application for implementation or amendment of a TCRF which, in turn, would assist in expediting the review process for such applications. They suggested that the commission develop forms for monitoring revenues from a TCRF and require the utility to make annual filings that show whether it is over-recovering or under-recovering. In response to the request for reports for monitoring revenues, SWEPCO stated that in ERCOT, a TCRF report is filed that shows the estimated cost, the actual cost, and the actual revenue, but there is no "true-up" provision. If a non-ERCOT utility is required to revise the TCRF for over-recovery, the utility should also be allowed to file a revised TCRF if the reports demonstrate an under-recovery. Xcel agreed. SWEPCO requested that the non-ERCOT utilities be treated the same as the ERCOT utilities unless the utility is allowed to revise the TCRF for under-recovery as well.

In written reply comments and oral comments, Pioneer supported the development of forms for filing applications and reporting forms for monitoring changes in revenues. Pioneer stated that, because the procedural schedule will be brisk, it is crucial that the filing package include adequate data to enable the commission and affected parties to evaluate the filing, and adequate reporting and monitoring forms will enable the commission and affected customers to evaluate whether the TCRF continues to reflect costs or whether it should be revised.

Xcel commented that the rule properly allows an electric utility to file an initial application to implement a TCRF and use any commission-prescribed forms for subsequent filings.

Commission response

The commission finds that it is most appropriate to allow the commission the discretion to develop forms as it deems necessary. The commission declines to require the utilities to wait until forms are developed to apply for a TCRF.

General Comments

In written comments, AXM & CARD urged the commission not to adopt any rule that allows for implementation of §36.209 by way of a TCRF. They stated that the use of a factor mechanism could easily permit an eligible utility to over-recover its transmission infrastructure improvement costs and changes in wholesale transmission charges, thereby negating the critical safeguard that a utility not be allowed to over-recover its costs. However, if the commission's intent is to implement §36.209 through a TCRF mechanism, AXM & CARD urged the commission to do so only if it adopted the recommendations of AXM & CARD regarding the TCRF true-up at least every three years; the calculation of the revenue requirement based on the utility's total net transmission plant; the rolling of the TCRF into base rates in a general rate case; and that, to the extent there is no true-up provision in the Transmission Cost Recovery Rule, the rule take into account all increases in revenue resulting from load growth.

Xcel disagreed with AXM & CARD that the commission should examine all of a utility's changes in costs and revenues before allowing an adjustment to the TCRF, instead of only transmission costs and revenues. Xcel stated that §36.209 was enacted to avoid the necessity for a full-blown examination of all costs and revenues, that AXM & CARD disagree with the statute and they are asking the commission to nullify it through this rulemaking. Xcel requested the commission decline to make this change.

In reply comments, Xcel stated that the goal of HB 989 is to provide electric utilities outside ERCOT the same opportunity to recover costs associated with new transmission investment as electric utilities in ERCOT. Xcel stated that the initial comments of AXM & CARD, OPC, and TIEC suggested so many layers of prescriptive requirements that the concept of timely recovery becomes almost meaningless. Xcel commented that the three-year true-up, which it proposed in its comments, along with the stringent oversight that commission staff has built into the proposed rule, should alleviate the concerns of the parties regarding over-recovery of the TCRF.

In reply comments, TIEC stated that §36.209, which addresses recovery for non-ERCOT utilities, sets forth a much different regulatory framework than §35.004(d), which addresses recovery for ERCOT utilities and that the two have little in common other than allowing for periodic recovery of transmission expenditures outside of a rate case. The TCRF method, TIEC stated, must be based on the explicit statutory directives, not simply modeled after the ERCOT method. AXM & CARD also commented that the ERCOT and non-ERCOT recovery provisions have little in common. They commented that non-ERCOT utilities, unlike ERCOT utilities, have control of their transmission and that ERCOT utilities must accommodate the introduction of new generation by deregulated generators as the needs of the deregulated generation market dictate. AXM & CARD stated that Xcel and SWEPCO gave no basis for comparing the two provisions.

AXM & CARD commented in the public hearing that considering the legislative history was very important in adopting the rule and stated that this history does not suggest that the proceeding for transmission cost recovery should necessarily be quick. AXM & CARD stated that HB 989, as originally filed, included language allowing recovery for transmission infrastructure improvement costs through an automatic pass-through. The original bill also directed the commission to establish a rule to allow non-ERCOT utilities to recover transmission infrastructure improvement costs through a rate rider mechanism and indicated that a proceeding under which a rider would be established would not be a rate proceeding. According to AXM & CARD, in the committee substitute, the language regarding the proceeding not being a rate proceeding was eliminated, the requirement for a rule was eliminated, and language was added prohibiting over-recovery by the utility. During the vote on the house floor, there were ad-

ditional changes, including limiting the bill's application to SPP utilities, adding the requirement for notice and hearing, adding the language with the requirement for expenditures to be reasonable and necessary, and deleting the requirement for a rate rider. When the bill was considered by the Senate, the WECC was added, meaning that the bill applied to a utility outside of the SPP; and the language allowing an automatic pass-through was eliminated. AXM & CARD stated that, if the legislature wanted to make this recovery an automatic pass-through, it would have done so. However, notice and a hearing are required. AXM & CARD emphasized that these utilities are not in ERCOT and that they are bundled utilities who have control over installation of generation. AXM & CARD stated that legislative history indicates the commission needs to review the costs and expenses to see whether anything should be recovered.

Xcel responded to others' oral comments. Xcel stated that because this rule requires commission approval of the TCRF, it does not provide for an automatic pass-through. Xcel did not dispute that this is a rate proceeding, that there should be no over-recovery, or that costs should be reasonable and necessary. Xcel stated its belief that ERCOT utilities also should not be permitted to over-recover and, therefore, non-ERCOT utilities should not be differentiated in that regard. Xcel stated that its comments were not inconsistent with the legislative history. Xcel disagreed that non-ERCOT utilities have control over who builds generation, and Xcel was concerned with TIEC's reply comment that Xcel in its initial comments made a veiled threat that it would not build transmission facilities. Xcel noted that they will have to commit to other generation that they do not have control over, such as wind farms. Xcel stated that sometimes they have to make a business decision of which transmission to build and that, if reliability is not an issue and the project is not needed to connect a generator, they may delay a transmission project for a year for cost recovery reasons.

In oral comments, TIEC responded to Xcel that the commission should not be concerned about imposing a threshold because of the illusion that transmission investment will not be made in a timely manner. TIEC stressed that it is important to justify the need for recovery.

Commission response

The general comments above have been considered in the commission's responses to each of the specific comments and corresponding revisions to the rule.

All comments, including any not specifically referred to herein, were fully considered by the commission.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §36.209, which grants the commission the authority to allow certain electric utilities that operate solely outside of ERCOT, to recover on an annual basis reasonable and necessary expenditures for transmission infrastructure improvement costs and changes in wholesale transmission charges to the extent that the costs or charges have not otherwise been recovered.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §36.209.

§25.239. Transmission Cost Recovery Factor for Certain Electric Utilities.

(a) Application. The provisions of this section apply to an electric utility that operates solely outside of the Electric Reliability Council of Texas in areas of Texas included in the Southwest Power Pool or the Western Electricity Coordinating Council and that owns or operates transmission facilities.

(b) Definitions.

(1) Approved transmission charges (ATC)--Wholesale transmission charges approved by a federal regulatory authority that are not being recovered through the electric utility's other retail or wholesale rates and that are appropriately allocated to Texas retail customers. The charges may relate to the use of transmission facilities owned and operated by another transmission service provider or regional transmission organization, including transmission-related administrative fees but not including dispatch fees, congestion charges, costs incurred to hedge congestion charges, or ancillary service charges.

(2) Transmission invested costs (TIC)--The net change in the electric utility's transmission investment costs including additions, upgrades, and retirements as booked in FERC accounts 350-359, and accumulated depreciation.

(c) Recovery authorized. The commission, after notice and hearing, may allow an electric utility to recover its reasonable and necessary costs for transmission infrastructure improvement and changes in wholesale transmission charges to the electric utility under a tariff approved by a federal regulatory authority to the extent that the costs or charges have not otherwise been recovered and are incurred after December 31, 2005. Any such recovery shall be made through the use of a transmission cost recovery factor (TCRF) approved by an order of the commission. The TCRF shall be calculated pursuant to subsection (d) of this section. If a utility has not had a base rate case with a final order issued after December 2005, the utility shall not be eligible for recovery under this provision without first obtaining a final order in a base rate case.

(d) Transmission cost recovery factor (TCRF). The TCRF shall be determined by the following formula:
Figure: 16 TAC §25.239(d)

(e) Transmission cost recovery factor revenue requirement (RR). For an electric utility subject to this section, the transmission cost recovery factor revenue requirement (RR) shall be calculated by using the following formula:
Figure: 16 TAC §25.239(e)

(f) Setting and amending the TCRF. An electric utility that is subject to this section may file an application to set or amend a TCRF. The commission staff may also file an application to amend a TCRF. An electric utility may not apply to amend its TCRF more frequently than once each calendar year, but a TCRF shall be reviewed or amended at least once every three years. Upon completion of a base rate case for a utility, the TCRF shall be set to zero. In a docket in which the TCRF is reviewed or amended, the commission may order the refund of any previous over-recovery, but the commission shall not order the surcharge of any under-recovery. An over-recovery shall be considered to have occurred if the revenues from the TCRF were greater than the costs that the TCRF was intended to recover.

(g) TCRF forms. The commission may develop forms for TCRF applications and for monitoring the revenues from a TCRF. If the commission develops and approves such forms, an electric utility shall use the forms as required by the instructions accompanying the form.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2007.

TRD-200706353
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 2, 2008
Proposal publication date: August 31, 2007
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 65. BOILERS

16 TAC §65.80

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 TAC Chapter 65, §65.80, regarding the boiler program inspection fees, without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7178), and will not be republished.

Based on the Department's annual fee review conducted pursuant to Texas Occupations Code, §51.202, the Commission voted at its meeting on September 21, 2007, to increase inspection fees in the boilers program because the inspection fees currently in place are below the amount required by the Department to cover costs. The increase would not adversely affect the administration and enforcement of the boilers program.

The amendment to §65.80(a)(1) raises the inspection fee conducted by an authorized inspector from $50 to $70.

The amendment to §65.80(a)(2)(A) raises the inspection fee for boilers other than heating boilers from $120 to $140.

The amendment to §65.80(a)(2)(B)(i) raises the inspection fee for boilers other than heating boilers without a manhole from $90 to $110.

The amendment to §65.80(a)(2)(B)(ii) raises the inspection fee for boilers other than heating boilers with a manhole from $120 to $140.

The amendment to §65.80(b) changes the special inspection fees from $650 plus travel and per diem to a flat fee of $1200.

The proposed amendments were published in the *Texas Register* on October 12, 2007. The comment period closed on November 12, 2007. The Department did not receive any public comments on the proposed amendments.

The amendments are adopted under Texas Occupations Code, Chapter 51 and Texas Health and Safety Code, Chapter 755, which authorizes the Commission to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Texas Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706340
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 1, 2008
Proposal publication date: October 12, 2007
For further information, please call: (512) 463-7348

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CHAPTER 75. AIR CONDITIONING AND REFRIGERATION CONTRACTORS

16 TAC §§75.10, 75.24, 75.27, 75.28, 75.73, 75.80, 75.90

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 TAC Chapter 75, §75.24 and §75.90; and new §75.27 and §75.28, regarding the air conditioning and refrigeration contractors program, without changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6505) and will not be republished.

The Commission also adopts amendments to 16 TAC Chapter 75, §75.10 and §75.80; and new §75.73 with changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6505) and will be republished.

These rules are necessary to implement the provisions of House Bill 463 ("HB 463") adopted by the 80th Legislature providing for registration of air conditioning and refrigeration technicians, to clarify ambiguous statutory definitions, and to delete provisions that are no longer relevant.

Section 75.10 is amended by adding new paragraph (19) to define the term "offering to perform" that appears in the statutory definition of the term "air conditioning and refrigeration contracting." Since September 1999 when the phrase was added to the statute, the Department has interpreted it to mean that advertising the availability of air conditioning and refrigeration services is offering to perform such services and that unlicensed individuals may not do so. Concerns have been raised that merely advertising is not offering in the sense of a contractual arrangement. To allay such concerns, the Commission adopts this new definition to clarify an ambiguous phrase, and make it clear that one who advertises the availability of such services must be licensed. The paragraphs below new paragraph (19) are renumbered.

New §75.10(24) is added to define the term "total replacement of a system" that appears in the statutory definition of the term "air conditioning and refrigeration maintenance work." HB 463, 80th Legislature, requires registration of air conditioning and refrigeration technicians and defines them as persons who assist a licensee in the performance of air conditioning and refrigeration maintenance work. The definition of maintenance work provides that it does not include total replacement of a system. The Com-

mission adopts this amendment to clarify the term to establish who must be registered as a technician.

Section 75.24 is amended at subsection (a)(1) and subsection (b) to add the terms "registrant" or "registration" as appropriate to include the new registration of technicians.

New §75.27 is added to establish registration application procedures and registration terms for technicians. Subsection (d) provides that temporary registrations, valid for 21 days, will be issued to applicants who have not been convicted of a criminal offense or been placed on deferred adjudication.

New §75.28 is added to provide that technicians may choose to obtain the right to use the designation "certified technician", though it is not required, and to establish the procedure for obtaining such certification.

New §75.73 is added to set out responsibilities of registered technicians. The existing rules for licensed air conditioning and refrigeration contractors and for contracting companies set out their respective responsibilities and those for contractors that are applicable to technicians have been included in the new rule. In addition, §75.73(a)(5) prohibits a registered technician who has not obtained certification from using the designation.

Section 75.80 is amended to add fees for technician registration and renewal of technician registration, $20.00, and technician certification, $15.00.

Section 75.90 is amended by deleting the phrase, "and 16 Texas Administrative Code, Chapter 60 of this title (relating to the Texas Commission of Licensing and Regulation)."

The proposed amendments and new rules were published in the *Texas Register* on September 21, 2007. The comment period closed on October 22, 2007. Fifteen public comments were received from a number of licensees and/or companies and associations and are discussed below.

A commenter asked about proposed §75.73(a)(5) that prohibits a registered technician from using the term "certified technician" unless he is certified by the Department. The commenter pointed out that some technicians are certified by organizations such as NATE and that they use the term "certified" to convey that status. The Commission recognizes that the prohibition is too broad. The rule is amended to allow persons who have been certified by examination given by a national recognized certification organization to also use the phrase.

Four commenters stated that persons who perform installations should also be required to register as technicians rather than only requiring technicians who perform air conditioning and refrigeration maintenance work to be registered. The purpose of HB 463 and the new proposed rules is to regulate technicians assisting in maintenance work, who to date, have been unregulated, unregistered and/or unlicensed. Registration of technicians will better protect the public, since the Texas Department of Licensing and Regulation ("TDLR") must conduct criminal background checks at the time of initial registration and annually as registrations are renewed. The Legislature did not define "technician" to include all persons who assist a licensed air conditioning and refrigeration contractor regardless of the type of work. TDLR is not authorized to expand the scope of the statute by rule nor is TDLR able to waive the statutory registration requirements. No changes to the proposed rules are adopted in response to these comments.

A representative of HVAC Excellence, an air conditioning and refrigeration technician certification organization, commented that some technician certification organizations have many different trade specific certification exams that are offered to technicians. He noted that passing one certification exam does not qualify one as an overall certified technician even though §75.28 appears to only require an applicant to have passed one examination. The statute only provides that a registered technician show proof that the technician passed a nationally recognized and administered certification examination or another examination of equal or greater difficulty approved by the department. The specific minimum battery of exams is left to the organizations developing and administering the certification examinations. No changes to the proposed rules are made in response to this comment.

One commenter made five different suggestions to change the rules. The first is to amend §75.10(3) to add to the definition of subcontractor a provision that subcontractors do not perform maintenance work. The commenter also suggested the addition of a new definition for "Registered air conditioning and refrigeration contractor" to include a statement that subcontractors who are not registered may not perform maintenance work. The statute does not address subcontractors, and the current rules addressing subcontractors appear to be working. No changes are made to the rules in response to this comment.

The second is to amend §75.27 to require that technicians notify TDLR whenever they have a change of employer. The statute does not require a registered technician to file any information regarding affiliation with a contractor. No changes are made in response to this comment.

The third is a suggestion that the responsibility placed upon technicians to assure mechanical integrity for the work they perform is misplaced. No language change was proposed. The responsibility for mechanical integrity of work performed by a technician does not lie solely with the technician; his supervising licensed contractor also has responsibility for the work performed and if investigation shows that the work was performed inappropriately because the supervisor insisted upon it, the supervisor will be held solely responsible. No changes are made in response to this comment.

The fourth is a suggestion that §75.73(a)(4) and (5) may lead a technician to believe that registration gives him the authority to perform any exempt work. The commenter was concerned that technicians might "free-lance" for any owner, lessee, or management company. The statutory exemption for maintenance work will not apply to a technician who is employed by a contractor who engages in air conditioning and refrigeration contracting to the public. No changes are made in response to this comment.

The fifth is a suggestion that the rules should state whether a registered technician is authorized to purchase refrigerants. The statute provides the authorization to persons who may purchase refrigerants and technicians are not included. No changes are made in response to this comment.

Another commenter objected to registration of technicians and suggested that if it is a matter of obtaining additional fees, licensing fees could be increased. HB 463 established the registration requirements for air conditioning and refrigeration technicians. No changes are made in response to this comment.

A representative of Air Conditioning Contractors of America-Texas (ACCA-TX) suggests the definition of "total replacement of a system" at §75.10(24) be revised so it reads

"Replacement of a package system or the condensing unit, the evaporator coil, the furnace, if applicable, and the air handling unit." This recommended change has been made.

One commenter, while not proposing rule changes, inquired concerning the nature of the registration and certification fees, and whether there will be renewal fees. Section 75.80 is changed to clarify that the $20.00 fee is for registration and for renewal of the registration, and that the $15.00 fee is for certification that does not need to be renewed.

Another commenter suggested that the registration period for technicians should be two years rather than one year. HB 463 establishes the one-year registration period. The Commission cannot change this time period in the rules.

A representative of Texas Apartment Association (TAA) suggested that §75.10(24) be amended to include the word "simultaneous" in the definition of "Total Replacement of a System". The Commission agrees with the suggested change, which will make it consistent with the language under the current definition of "Repair work" at §75.10(22). The change has been made to the rule in response to this comment.

The amendments and new rules are adopted under Texas Occupations Code, Chapter 51 and Chapter 1302, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Chapter 1302. No other statutes, articles, or codes are affected by the adoption.

§75.10. Definitions.

The following words and terms have the following meanings:

(1) Act--Texas Occupations Code, Chapter 1302, Air Conditioning and Refrigeration Contractors.

(2) Advertising or Advertisement--Any commercial message which promotes the services of an air conditioning and refrigeration contractor.

(3) Air conditioning and refrigeration subcontractor--A person or firm who contracts with a licensed air conditioning contractor for a portion of work requiring a license under the Act. The subcontractor contracts to perform a task according to his own methods, and is subject to the contractor's control only as to the end product or final result of his work.

(4) Air conditioning or heating unit--A stand-alone system with its own controls that conditions the air for a specific space and does not require a connection to other equipment, piping, or ductwork in order to function.

(5) Assumed name--As defined in the Business and Commerce Code, Title 4, Chapter 36, Subchapter A, §36.02.

(6) Biomedical Remediation--The treatment of ducts, plenums, or other portions of air conditioning or heating systems by applying disinfectants, anti-fungal substances, or products designed to reduce or eliminate the presence of molds, mildews, fungi, bacteria, or other disease-causing organisms.

(7) Boiler--As defined in Chapter 755 of the Health and Safety Code.

(8) Business affiliation--The business organization to which a licensee elects to assign his license.

(9) Cheating--Attempting to obtain, obtaining, providing, or using answers to examination questions by deceit, fraud, dishonesty, or deception.

(10) Contracting--Agreeing, either orally or in writing, to perform work or performing work, either personally or through an employee or subcontractor.

(11) Cryogenics--refrigeration that deals with producing temperatures ranging from:

(A) -250 degrees F to Absolute Zero (-459.69 degrees F);

(B) -156.6 degrees C to -273.16 degrees C;

(C) 116.5 degrees K to 0 degrees K; or

(D) 209.69 degrees R to 0 degrees R.

(12) Department--The Texas Department of Licensing and Regulation.

(13) Design of a system--Making decisions on the necessary size of equipment, number of grilles, placement and size of supply and return air ducts, and any other requirements affecting the ability of the system to perform the function for which it was designed.

(14) Direct supervision--Directing and verifying the design, installation, construction, maintenance, service, repair, alteration, or modification of an air conditioning, refrigeration, process cooling, or process heating product or equipment to assure mechanical integrity. Verification may include, but is not limited to:

(A) personal inspection of a job;

(B) contacting the customer by mail, e-mail, or telephone to determine if the customer is satisfied with the installation and service provided;

(C) reviewing a checklist completed by a person who performed some or all of the work on a job; and

(D) reviewing an inspection report of the job made by a municipal mechanical inspector.

(15) Employee--An individual who performs tasks assigned by an employer, and who is subject to the employer's control in all aspects of job performance, except that a licensed air conditioning and refrigeration contractor remains responsible for all air conditioning work he or she performs. An employee's wages are subject to deduction of federal income taxes and social security payments. An employee may be full time, part time, or seasonal. Simultaneous employment with a temporary employment agency, a staff leasing agency, or other employer does not affect an employee's status for the purpose of this rule.

(16) Executive Director--The Executive Director of the Department.

(17) Full time employee--An employee who is present on the job either 40 hours a week, or at least 80% of the time the company is offering air conditioning and refrigeration contracting services to the public, whichever is less.

(18) Licensee--An individual holding a license of the class and endorsement appropriate to the work performed under the Act and these rules.

(19) Offering to perform--Making a written or oral proposal, contracting in writing or orally to perform air conditioning and refrigeration work, or advertising in any form through any medium that a person or business entity is an air conditioning and refrigeration con-

tractor, or that implies in any way that a person or business entity is available to contract for or perform air conditioning and refrigeration work.

(20) Permanent office--Any location, which must be identified by a street address, or other data identifying a rural location, from which a person or business entity conducts the business of an air conditioning and refrigeration contracting company. A location not open to the public, or not located within the state, may serve as a permanent office so long as the department and consumers have access to the licensee required by §1302.252 of the Act to be employed in each permanent office.

(21) Primary process medium--A refrigerant or other primary process fluid that is classified in the current ANSI/ASHRAE Standard 34 as Safety Group A1, A2, B1, or B2. Safety Groups A3 and B3 refrigerants are specifically excluded.

(22) Proper installation, and service--Installing, servicing, repairing, and maintaining air conditioning and refrigeration equipment in accordance with:

(A) applicable municipal ordinances and codes adopted by a municipality where the installation occurs;

(B) the current Uniform Mechanical Code or the current International Mechanical Code and International Fuel Gas Code, in areas where no code has been adopted;

(C) the manufacturer's specifications and instructions; and

(D) all requirements for safety and the proper performance of the function for which the equipment or product was designed.

(23) Repair work--Diagnosing and repairing problems with air conditioning, commercial refrigeration, or process cooling or heating equipment, and remedying or attempting to remedy the problem. Repair work does not mean simultaneous replacement of the condensing unit, furnace, and evaporator coil.

(24) Total replacement of a system--Simultaneous replacement of the condensing unit, the evaporator coil, the furnace, if applicable, and the air handling unit, or replacement of a package system.

§75.73. Air Conditioning and Refrigeration Technician--Responsibilities.

(a) A registrant shall:

(1) provide proper installation and service, and assure the mechanical integrity of work and installations performed by the registrant;

(2) not misrepresent the need for services, services to be provided, or services that have been provided;

(3) not knowingly perform any non-exempt air conditioning and refrigeration maintenance work without being under the supervision of a licensed air conditioning and refrigeration contractor;

(4) not knowingly provide non-exempt air conditioning and refrigeration work for or on behalf of an air conditioning and refrigeration contracting company that does not have an affiliation with a licensed individual who supervises all air conditioning and refrigeration work as provided by Texas Occupations Code, Chapter 1302, and these rules; and

(5) not use the designation "certified technician" unless he has been certified by the Department pursuant to §75.28, or has been certified by examination given by a nationally recognized certification organization, and the individual lists the organization.

(b) A registrant shall not allow another individual to use his registration for any purpose.

(c) A registrant shall not allow any air conditioning and refrigeration contracting company, or any air conditioning and refrigeration contractor with which he is not employed to use his registration for any purpose, except as otherwise allowed by these rules.

(d) A registrant shall notify the Department, in writing, within thirty days of any change in permanent mailing address, and telephone number.

(e) Altering a registration in any way is prohibited and is grounds for imposition of administrative penalties and/or sanctions.

§75.80. Fees.

(a) Non-refundable license application fee is $130.

(b) Examination fee is $90 for each examination requested.

(c) Renewal application fee is $80.

(d) Issuance of a revised or duplicate license or certificate is $25.

(e) An endorsement to an existing license is $25.

(f) Certificate of Registration application fee is $25.

(g) Technician registration and registration renewal fee is $20.

(h) Technician certification fee is $15.

(i) Late renewal fees for licenses and registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 31, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 463-7348

CHAPTER 82. BARBERS

16 TAC §§82.10, 82.22, 82.29, 82.31, 82.70, 82.71, 82.78, 82.80, 82.100

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments 16 TAC Chapter 82, §§82.10, 82.29, 82.31, 82.70, 82.71, and 82.100, regarding the barbers program, without changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7841), and will not be republished.

The Commission also adopts amendments to 16 TAC Chapter 82, §82.22 and §82.80; and new §82.78 with changes from the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7841) and will be republished.

These adopted amendments are a second phase of rulemaking necessary to implement House Bill 2106, 80th Legislature, and to make certain clean-up changes in the rules for barbering. The provisions of House Bill 2106 became effective on June 15, 2007 and require the Commission to adopt rules necessary to implement the new legislation by January 1, 2008. Also included are reductions in the application and renewal fees for a Class A barber license. The proposed rule changes were recommended by the Advisory Board on Barbering at its meeting on October 15, 2007. Primarily, the rule changes implement provisions of House Bill 2106 that create two new license types, dual shops and mobile shops. A dual shop license will allow a combined barber and beauty shop to operate under one license. Currently, a combined barber and beauty shop must hold both a barbershop permit and a beauty shop license. A mobile shop license will allow a shop offering barbering services to be operated as a mobile unit, rather than in a fixed location.

In §82.10 the definition of "barber establishment" is amended to clarify that the Texas Department of Licensing and Regulation's ("Department") jurisdiction under the barber statute encompasses barber establishments that are not licensed. The Department may encounter unlicensed barber establishments that, in addition to failing to have a current license, have health and safety violations. Defining the above term to include unlicensed establishments will clarify that an unlicensed establishment may be subject to administrative penalties for violating health and safety and other rules applicable to establishments. This is consistent with the Department's enforcement authority under Chapters 51, 1601, and 1603, Texas Occupations Code.

To implement provisions of House Bill 2106, the definition of "barber establishment" is also amended to include dual shops and mobile shops. The word "manicurist" is stricken to acknowledge that there are now other types of specialty shops in the barber program besides manicurist. The definition of "booth rental permit" is amended to recognize that this type of permit would apply to a hair weaver or hair braider and to a person who works in a dual shop. Definitions are added for the terms "dual shop" and "mobile shop," and the term "self-contained" is added to augment the definition of a mobile shop. The mobile shop definitions are necessary to prescribe that services be performed in an enclosed space where a sanitary environment may be maintained. The requirement that a mobile shop be self-contained is to ensure that a mobile shop will always have access to water and electricity, which are necessary for performing services.

Section 82.22 is amended to add licensing requirements for dual shops and mobile shops. A dual shop must comply with all statutory and rule requirements that apply to barbershops and beauty shops. Because of the unique characteristics of a mobile shop and the Department's need to keep track of the location of a mobile shop for the purpose of conducting inspections or investigating complaints, specific requirements are added for mobile shops. A mobile shop must provide the Department with a permanent physical address from which the mobile unit is dispatched and to which the mobile unit is returned when not in use and provide a permanent mailing address where correspondence from the Department may be received. Some changes have been made from the proposed version of the rules. The emphasis of these changes is to make the requirements for mobile shops more consistent with the requirements for conventional, fixed-location shops, unless there are unique characteristics of mobile shops that require a different rule. In the view of the Commission and the Department, this is the appropriate level of regulation for mobile shops. Accordingly, §82.22 as adopted removes the requirement for a mobile shop to furnish a detailed floor plan, which fixed-location shops are not required to do. Instead, the mobile shop license applicant would be required to verify that the shop complies with legal requirements. Additionally, the requirement is removed for a mobile shop to be inspected prior to operation. This is no longer a requirement for fixed-location shops.

Section 82.29 is amended to clarify that the requirements for an establishment that is relocating do not apply to a mobile shop.

Section 82.31 is amended to add dual shops and mobile shops to the list of license types that have a two-year term.

Section 82.70 is amended to add dual shops and mobile shops to the list of individuals and establishments that may advertise in the yellow pages under "Barber."

Section 82.71 is amended to add specific responsibilities that apply to dual shops. Dual shops must comply with all statute and rule requirements that apply to barbershops and those that apply to beauty salons. In addition, a dual shop that is without the services of at least one licensed barber (or cosmetologist) for a period of 90 days or more may not place any advertisement or display any sign or symbol indicating that the shop offers barbering (or cosmetology) services and must remove any existing sign or symbol indicating that the shop offers barbering (or cosmetology) services. This provision is added to help ensure that a dual shop is advertising only those services that the shop actually provides.

A new §82.78 is added to establish responsibilities that apply specifically to mobile shops. Generally, a mobile shop must comply with health and safety requirements and all other requirements applicable to barber shops or specialty shops. As in §82.22, changes are made from the proposed rules to make the requirements more similar to those for fixed-location shops, unless different requirements are needed to address the unique circumstances of mobile shops. A mobile shop must maintain a physical address and must notify the Department within 10 days of any change in physical or mailing address. A mobile shop must maintain certain records for one year after the record is made. In a change from the proposed rule, the shop needs to maintain records of itineraries only if the shop elects to furnish itineraries to the Department under subsection (d). To facilitate unannounced inspections by the Department, a mobile shop must comply with certain requirements to enable the Department to track the shop's location. In a change from the proposed rule, the mobile shop must *either* have a Global Positioning System (GPS) tracking device that enables the Department to track the shop over the Internet, *or* the mobile shop must submit weekly itineraries to the Department. As proposed, the rule would have required both the GPS device and submission of itineraries. This provision has been changed from the proposed rule to match the more lenient standard adopted in the similar rule for cosmetologists. The Department believes that the adopted rule gives the Department sufficient means to track mobile shops for inspection purposes. Specific requirements are also included for the equipment and use of a mobile shop. Finally, the provision of the proposed rule is removed that required a mobile shop to be subject to periodic inspections at least four times each year. Mobile shops, like other shops, will be subject to the general rule of periodic inspection at least once every two years and to risk-based inspections.

Section 82.80 is amended to add application and renewal fees for dual shop and mobile shop licenses. In a change from the

proposed rules, the initial and renewal fees for a mobile shop have been reduced to $60 each, which is the same amount as the initial and renewal fees for a barbershop. Because the provisions for additional inspections of mobile shops have been removed, the Department's costs in regulating mobile shops will not be significantly higher than those for fixed-location shops. Based on the Department's annual fee review conducted pursuant to §51.202, Occupations Code, the Commission of Licensing and Regulation voted at its meeting on September 21, 2007, to reduce the application and renewal fees for a Class A barber license from $90 each to $70 each. The amendments include this change. In a change from the proposed rule, the rule will specify that the fee reduction takes effect on March 15, 2008. This date will give the Department time to implement the change. In particular it will allow the Department to send out license renewal notices with the correct fee amount. The fee for initial inspections of mobile shops has been removed since the Department will not be conducting such inspections. Finally, a provision is added to clarify that fees are generally nonrefundable.

Section 82.100 is amended to include certain statutory language in the definition of "sterilize" or "sterilization." The rule now specifies, as stated in §1603.352, Occupations Code, that a sterilizer used to sterilize instruments in nail services must be listed with the United States Food and Drug Administration.

The proposed amendments were published in the *Texas Register* on November 2, 2007. The comment period closed on December 3, 2007. Several public comments were received and are discussed below.

One commenter correctly points out a discrepancy between the proposed barber rules and the proposed cosmetology rules regarding the requirements for mobile shops. The Advisory Board on Cosmetology recommended requiring that mobile shops either have a GPS tracking device or submit weekly itineraries to the Department. The Advisory Board on Barbering recommended requiring that mobile shops both have a GPS tracking device and submit weekly itineraries to the Department. The commenter suggests changing the barber rule to match the more lenient cosmetology rule.

Department response: The Department agrees with the comment. The rule as adopted makes the GPS tracking device and submitting itineraries two options for mobile shops, as in the cosmetology rule. The Department believes that this requirement is sufficient to enable the Department staff to locate mobile shops for inspection.

Another commenter is an out-of-state seller of a barber kiosk. The kiosk is a stationary booth that would be placed inside a building, such as a mall or store, and would allow one individual to perform barbering services. The commenter does not suggest any specific changes to the rules but takes the position that the kiosk should be accepted as a barbershop in Texas under either the mobile shop requirements or conventional shop requirements.

Department response: The Department does not believe that this comment warrants any change to the rules. The comment is not really pertinent to these rules because it would appear the kiosk in question would fall under the current requirements for fixed-location shops.

One commenter disagrees with the requirement for a mobile shop to obtain a GPS tracking device since there is no restriction on the geographical area in which a mobile shop may operate.

Department response: The purpose of the GPS tracking device is to allow the Department to locate a mobile shop to perform an unannounced inspection. However, the provision has been modified, as discusses above, to make the GPS device one option for the mobile shop.

Another commenter requests that the Commission lower the barber licensing fees significantly below the $70 level proposed in these rules. The Commission has approved, based on the Department's fee review, reducing the fees from $90 to $70.

Department response: The Department disagrees with this comment. In arriving at the $70 figure, the Department analyzed the level of fees necessary to generate the revenue required to operate the barber program and to meet the Department's obligations to raise the level of revenue mandated by the Legislature. The fee adopted is the appropriate amount in light of these considerations.

The same commenter believes that the proposed rules do not adequately guard against the possibility that a dual shop would advertise barber services without actually employing a barber. The commenter would enact more stringent requirements for a dual shop that is without the services of a barber.

Department response: The Department disagrees with this comment. The adopted rules do seek to address this issue by requiring that a dual shop, that is without the services of a barber for 90 days, must cease advertising barber services and remove any existing sign or symbol that the shop offers barber services. The Department believes that the rule is sufficient to discourage a dual shop from advertising barber services without actually employing a barber. The 90-day period is a reasonable period of time to allow the shop to obtain the services of a barber.

Finally, the Texas Association of Tonsorial Artists objects to unspecified portions of the proposed rules and requests an additional meeting of the Advisory Board on Barbering.

Department response: Because the commenter did not raise any specific objections, the Department is unable to address the commenter's concerns.

The amendments and new rule are adopted under Texas Occupations Code, Chapters 51, 1601, and 1603, which authorize the Department to adopt rules as necessary to implement those chapters and any other law establishing a program regulated by the Department. In particular, many of these rule changes are adopted to implement the provisions of House Bill 2106, 80th Legislature.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1601, and 1603. No other statutes, articles, or codes are affected by the adoption.

§82.22. Permit Requirements--Barbershops, Specialty Shops, Dual Shops, Mobile Shops, and Booth Rental.

(a) To be eligible for a Barbershop, Specialty Shop Permit, a Dual Shop or Mobile Shop License, or a Booth Rental Permit, an applicant must:

(1) submit the application on a department approved form;

(2) pay the fee required under §82.80; and

(3) meet other applicable requirements of the Act and this chapter.

(b) Barbershop Permit--To be eligible for a barbershop permit, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.303.

(c) Specialty Shop Permit--To be eligible for a Specialty Shop Permit, an applicant must meet the eligibility requirements set forth in Texas Occupations Code §1601.305. The categories of Specialty Shop Permits issued by the department are: manicurist, hair weaving, and hair braiding.

(d) Dual Shop License--To be eligible for a Dual Shop License, an applicant must comply with the requirements of the Act, this chapter, Texas Occupations Code, Chapter 1602, and 16 TAC Chapter 83 for obtaining a beauty salon license and a barbershop permit.

(e) Mobile Shop License--To be eligible for a Mobile Shop License, an applicant must:

(1) provide a permanent physical address from which the mobile unit is dispatched and to which the mobile unit is returned when not in use;

(2) provide a permanent mailing address where correspondence from the department may be received; and

(3) verify that the mobile shop complies with the requirements of the Act and this chapter.

(f) Booth Rental Permit--To be eligible for a booth rental permit, an applicant must hold a valid Department-issued Class A barber certificate, manicurist license, hair weaving specialty certificate of registration, or hair braiding specialty certificate of registration and meet the requirements of this section.

§82.78. Responsibilities of Mobile Shops.

(a) A mobile shop shall comply with all health and safety requirements and all other requirements of the Act and this chapter for barbershops or specialty shops, as applicable, except as modified by this section or as otherwise indicated.

(b) A mobile shop license holder shall maintain a permanent physical address as required by §82.22(e). The mobile shop shall notify the department in writing of any change in physical or mailing address within 10 calendar days of the change.

(c) Records of the following shall be kept within the mobile unit and made available for inspection by department personnel: appointments; itineraries, if the shop submits itineraries to the department as provided by subsection (d); license numbers of employees and independent contractors; and vehicle identification numbers of the mobile shop. Records of appointments and itineraries shall be kept for a period of at least one year from the date the record is made.

(d) A mobile shop shall either:

(1) have a Global Positioning System (GPS) tracking device that enables the department to track the location of the mobile shop over the Internet and meet the following requirements:

(A) the device shall be on board and functioning at all times the mobile shop is in operation or open for business; and

(B) the mobile shop shall provide the department with all information necessary to track the shop over the Internet; or

(2) submit to the department, in a manner specified by the department, a weekly itinerary showing the dates, exact locations, and times of service to be provided. The license holder shall submit the itinerary not less than 7 calendar days prior to the beginning of service described in the itinerary and shall submit to the department any changes in the itinerary not less than 24 hours prior to the change. A mobile shop shall follow the itinerary in providing service.

(e) Furniture shall be anchored to the unit.

(f) All chemicals in the mobile shop shall be stored in cabinets secured with safety catches and shall be stored separate and apart from other articles or equipment in the shop.

(g) A mobile shop shall display on both sides of the exterior of the mobile shop, the mobile shop's license number and a sign stating the name of the shop.

(h) A mobile shop shall have a water heater that provides fresh, hot water continuously and on demand.

(i) A mobile unit shall have a fresh water tank holding a sufficient amount of fresh water to perform the day's business. If a mobile unit's fresh water supply is depleted, operation must cease until the supply is replenished.

(j) A mobile shop shall have a functioning restroom within its perimeter, including a self-contained, flush toilet with holding tank.

(k) No services may be performed outside the mobile shop or while the mobile shop is in motion.

(l) A mobile shop may not be used as a residence or for any other purpose besides providing barbering services.

§82.80. Fees.

(a) Application Fees:

(1) Class A Registered Barber License--$70 (includes $10 newsletter fee) for applications filed prior to March 15, 2008; $70 (includes $10 newsletter fee) for applications filed on or after March 15, 2008.

(2) Barber Teacher Certificate--$70

(3) Barber Technician License--$40 (includes $10 newsletter fee)

(4) Manicurist License--$40 (includes $10 newsletter fee)

(5) Student Permit--$35 (includes $10 law and rules book fee)

(6) Hair Weaving Specialty Certificate of Registration--$53 (includes $10 newsletter fee)

(7) Hair Braiding Specialty Certificate of Registration--$53 (includes $10 newsletter fee)

(8) Registered Examination Proctor--$25

(9) Barbershop Permit--$60

(10) Specialty Shop Permit--$50

(11) Booth Rental Permit--$50

(12) School Original Permit--$500

(13) Dual Shop--$130

(14) Mobile Shop--$60

(b) Renewal Fees:

(1) Class A Registered Barber License--$70 (includes $10 newsletter fee) for licenses expiring prior to March 15, 2008; $70 (includes $10 newsletter fee) for licenses expiring on or after March 15, 2008.

(2) Barber Teacher Certificate--$70

(3) Barber Technician License--$90 for licenses expiring on or before May 31, 2006; $40 for licenses expiring on or after June 1, 2006 (includes $10 newsletter fee)

(4) Manicurist License--$40 (includes $10 newsletter fee)

(5) Student Permit--No charge

(6) Hair Weaving Specialty Certificate of Registration--$53 (includes $10 newsletter fee)

(7) Hair Braiding Specialty Certificate of Registration--$53 (includes $10 newsletter fee)

(8) Registered Examination Proctor--$25

(9) Barbershop Permit--$60

(10) Specialty Shop Permit--$50

(11) Booth Rental Permit--$50

(12) School Permit--$300

(13) Dual Shop--$100

(14) Mobile Shop--$60

(c) License by Reciprocity or Endorsement--$100

(d) Issuance of a revised or duplicate license, certificate or permit--$25

(e) Verification of license, permit or certificate to other states--$25

(f) Law and Rules Book Fee--$10

(g) Registered Examination Proctor Department Training Course--$50

(h) Late renewals fees for licenses, certificates and permits issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(i) Inspection Fees (for each occurrence):

(1) Initial Inspection or Reinspection of school--$500

(2) Risk-based Inspection Fees for schools and shops--$150

(j) All fees are nonrefundable, except as otherwise provided by law or commission rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706341
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 1, 2008
Proposal publication date: November 2, 2007
For further information, please call: (512) 463-7348

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CHAPTER 83. COSMETOLOGISTS

16 TAC §§83.10, 83.20, 83.22, 83.25, 83.26, 83.29, 83.31, 83.71, 83.78, 83.80, 83.100

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 TAC Chapter 83, §§83.10, 83.20, 83.26, 83.29, 83.31, 83.71, and 83.100, regarding the cosmetologists program, without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7625) and will not be republished.

The Commission also adopts amendments to 16 TAC Chapter 83, §§83.22, 83.25, and 83.80; and new §83.78 with changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7625) and will be republished.

These rule changes are a second phase of rulemaking necessary to implement House Bill 2106, 80th Legislature, to adjust continuing education requirements, and to make additional clean-up changes in the rules for cosmetologists. The provisions of House Bill 2106 became effective on June 15, 2007 and require the Commission to adopt rules necessary to implement the new legislation by January 1, 2008. Also included are changes to the continuing education requirements for cosmetologists, as recommended by the Advisory Board on Cosmetology, and a reduction in the fee for a revised/duplicate license. These rule changes, with the exception of a clean-up change in §83.100, were recommended by the Advisory Board on Cosmetology at its meeting on September 10, 2007.

In §83.10 the definitions of "beauty culture school" and "cosmetology establishment" are amended to clarify that the Texas Department of Licensing and Regulation's ("Department") jurisdiction under the cosmetology statute encompasses establishments that are not licensed. The Department has encountered unlicensed cosmetology establishments that, in addition to failing to have a current license, have violated health and safety rules. Defining the above terms to include unlicensed establishments will clarify that an unlicensed cosmetology establishment may be subject to administrative penalties for violating health and safety and other rules applicable to establishments. This is consistent with the Department's enforcement authority under Chapters 51, 1602, and 1603, Texas Occupations Code.

To implement provisions of House Bill 2106, the definition of "cosmetology establishment" is also amended to include dual shops and mobile shops. Likewise, definitions are added for the terms "dual shop" and "mobile shop," and the term "self-contained" is added to augment the definition of a mobile shop. The mobile shop definitions are necessary to prescribe that services be performed in an enclosed space where a sanitary environment may be maintained. The requirement that a mobile shop be self-contained is to ensure that a mobile shop will always have access to water and electricity, which are necessary for performing services.

In §83.20(a) and (b) the word "licensed" is inserted to clarify that the cosmetology hours in question must be obtained from a licensed beauty culture school. This change is necessary in light of the amended definition of "beauty culture school" in §83.10, which now includes unlicensed schools. Subsection (c) is amended to recognize that operator or specialty experience required for issuance of an instructor license may be earned in a dual shop.

Section 83.22 is amended to add licensing requirements for dual shops and mobile shops. Consistent with the provisions of House Bill 2106, a dual shop must comply with all statutory and rule requirements that apply to barbershops and beauty shops. Because of the unique characteristics of a mobile shop and the Department's need to keep track of the location of a mobile shop for the purpose of conducting inspections or investigating complaints, specific requirements are added for mobile shops. A mobile shop must provide the Department with a permanent physical address from which the mobile unit is dispatched and

to which the mobile unit is returned when not in use and provide a permanent mailing address where correspondence from the department may be received. Some changes have been made from the proposed version of the rules. The emphasis of these changes is to make the requirements for mobile shops more consistent with the requirements for conventional, fixed-location shops, unless there are unique characteristics of mobile shops that require a different rule. In the view of the Commission and the Department, this is the appropriate level of regulation for mobile shops. Accordingly, §83.22 as adopted removes the requirement for a mobile shop to furnish a detailed floor plan, which fixed-location shops are not required to do. Instead, the mobile shop license applicant would be required to verify that the shop complies with legal requirements. Additionally, the requirement is removed for a mobile shop to be inspected prior to operation. Since an initial inspection before operation is no longer required for fixed-location shops, such an inspection is not deemed necessary for mobile shops.

Section 83.25 is changed from the proposed rule. The proposed amendments to the rule were based upon the Advisory Board on Cosmetology's review of the continuing education requirements. The Board's opinion was that the overall number of continuing education hours for operators should be reduced and that the breakdown of hours into various topics should be changed for all license types. The Board's recommendation, as reflected in the proposed rules, was to reduce the hours required for an operator from 12 to six and the number of Sanitation hours required for operators and specialty instructors from four to two. For each license type, the proposed rules required two hours in cosmetology law and rule topics other than Sanitation. After thorough consideration of the Board's recommendation and the public comments, the Commission believes that the number of hours for each license type should be reduced to six, and this is reflected in the adopted rule. While the Commission agrees with the Board that six hours, with two hours in Sanitation, is a sufficient requirement for operators, the Commission believes that these changes should apply to all license types. The Commission is particularly concerned that the proposed rules would have lowered the hours for an operator, which is a higher level of licensure in terms of scope of practice, below that of specialty licenses. The Commission agrees with the Board that two hours of cosmetology law and rules for all license types is a needed change and will help the Department in obtaining compliance with the law and rules. The Commission believes that these changes are a logical extension of the proposed rules. Additionally, clean-up changes are made to remove obsolete language.

Section 83.26 is amended to clarify that the license renewal provisions of the rule apply to establishment licenses as well as individual licenses.

Section 83.29 is amended to clarify that the requirements for an establishment that is relocating do not apply to a mobile shop.

Section 83.31 is amended to add dual shops and mobile shops to the list of license types that have a two-year term.

Section 83.71 is amended to add specific responsibilities that apply to dual shops. Dual shops must comply with all statute and rule requirements that apply to barbershops and those that apply to beauty salons. In addition, a dual shop that is without the services of at least one licensed barber (or cosmetologist) for a period of 90 days or more may not place any advertisement or display any sign or symbol indicating that the shop offers barbering (or cosmetology) services and must remove any existing sign or symbol indicating that the shop offers barbering (or cosmetology) services. This provision is added to help ensure that a dual shop is advertising only those services that the shop actually provides.

A new §83.78 is added to establish responsibilities that apply specifically to mobile shops. Generally, a mobile shop must comply with health and safety requirements and all other requirements applicable to beauty salons or specialty salons. As in §83.22, changes are made from the proposed rules to make the requirements more similar to those for fixed-location shops, unless different requirements are needed to address the unique circumstances of mobile shops. A mobile shop must maintain a physical address and must notify the Department within 10 days of any change in physical or mailing address. A mobile shop must maintain certain records for one year. In a change from the proposed rule, the shop needs to maintain records of itineraries only if the shop elects to furnish itineraries to the Department under subsection (d). To facilitate unannounced inspections by the Department, a mobile shop must choose one of two options for enabling the Department to track the shop's location. The mobile shop may have a Global Positioning System (GPS) tracking device that enables the Department to track the shop over the Internet, or the mobile shop may submit weekly itineraries to the Department. Specific requirements are included for the equipment and use of a mobile shop. Finally, the provision of the proposed rule is removed that would have required a mobile shop to be subject to periodic inspections at least four times each year. Mobile shops, like other shops, will be subject to the general rule of periodic inspection at least once every two years and to risk-based inspections.

Section 83.80 is amended to clarify that the application and renewal fees apply to public as well as private beauty culture schools. Based on the Department's annual fee review, the Commission voted at its meeting on September 21, 2007, to reduce the fee for a revised/duplicate license from $53 to $25. The amended rule includes this change. This change will bring the fee in line with similar fees in other Department programs. In a change from the proposed rules, the initial and renewal fees for a mobile shop have been reduced to $106 and $69 respectively, which are the same amount as the initial and renewal fees for a beauty salon. Because the provisions for additional inspections of mobile shops have been removed, the Department's costs in regulating mobile shops will not be significantly higher than those for fixed-location shops. The fee for initial inspections of mobile shops has been removed since the Department will not be conducting such inspections. The wording of the risk-based inspection fee provision is changed to ensure that all types of establishment licenses are included. Finally, a provision is added to clarify that fees are generally nonrefundable.

Section 83.100 is amended to include certain statutory language in the definition of "sterilize" or "sterilization." The rule now includes the requirement, as stated in §1603.352, Texas Occupations Code, that a sterilizer used to sterilize instruments in nail services must be listed with the United States Food and Drug Administration.

The proposed amendments were published in the *Texas Register* on October 26, 2007. The comment period closed on November 26, 2007. Several public comments were received and are discussed below.

One commenter, the owner of a beauty culture school, expresses a desire to offer both the cosmetology and barber

curricula. The commenter questions whether the dual shop license would apply to schools.

Department response: The dual shop license provisions of House Bill 2106 expressly apply to barbershops and beauty salons, not to schools. The legislation does not permit a school to operate as a combined barber school and cosmetology school and hold one license for both types of schools. Current §82.72(q) effectively prevents a cosmetology school from being located on the same premises as a barber school. This particular rule provision has not been proposed for revision at this time and so is not a subject of the current rulemaking.

Another commenter, a continuing education instructor, disagrees with changes to the continuing education requirements. Specifically, the commenter suggests keeping four hours of Sanitation; adding two hours of law and rules; keeping the current 12 hour requirement; not allowing continuing education hours for time walking around at shows; increasing the instructor requirement to four hours; and limiting the number of hours from on-line courses to 1/2 the required time.

Department response: The Department generally disagrees with the comments. The Department believes that reducing the number of continuing education hours for each license type is warranted and would provide a sufficient level of continuing education. In establishing continuing education requirements, the Department is primarily concerned with public health and safety and believes that it is necessary to require only the amount of continuing education that furthers the protection of public health and safety. The Advisory Board on Cosmetology, comprised of experts from various segments of the cosmetology industry, recommended reducing the required hours for operators, and the Department believes that the adopted rule is a logical extension of this recommendation. The Department has not seen evidence that increasing the requirements for instructors is necessary. The Department believes that on-line courses, when provided in a sufficiently secure environment, are appropriate for continuing education and do not need to be limited to an arbitrary percentage of time. The Department, under current rules, works diligently to ensure that continuing courses are substantive and contain information that is appropriate for continuing education credit.

A commenter recommends requiring only two hours total for both Sanitation and law and rules.

Department response: The Department disagrees with the comment. The Department believes that two hours for both subjects is not sufficient. Sanitation is a critical area in which licensees should maintain current knowledge. Likewise, there are law and rule requirement aside from sanitation of which licensees need to be aware. Both of these topics are important and require more than a combined total of two hours.

A commenter objects to the concept of dual shops and having one license for a combined barber and beauty shop.

Department response: The Department disagrees with the comment. The dual shop license was created by the Texas Legislature in statute, and these rules implement that statutory change. The Department does not have discretion to fail to implement the statutory provision.

The same commenter objects to the fact that hair braiders are not permitted to shampoo hair.

Department response: The substantive requirements for hair braiders are not addressed in and are not relevant to this rulemaking.

A commenter objects to the concept of mobile shops.

Department response: Mobile shops are specifically authorized by the Texas Legislature in statute, and these rules implement that statutory change. The Department does not have discretion to fail to implement the statutory provision.

A commenter indicates that eight hours of continuing education are sufficient. The commenter objects to the requirement of Sanitation hours.

Department response: The Department agrees with the commenter to the extent that a reduction in continuing education hours is warranted. The Department's view of the appropriate level of continuing education is reflected in the adopted rules. The Department strongly disagrees that sanitation hours should not be required. Sanitation is a critical area in which licensees must be educated to help prevent the spread of infectious or contagious diseases.

A cosmetology continuing education provider objects to the proposed reduction in continuing education hours.

Department response: The Department disagrees with the comment and believes that reducing the number of continuing education hours as stated in the adopted rule is warranted and would provide a sufficient level of continuing education. The Advisory Board on Cosmetology, comprised of experts from various segments of the cosmetology industry, recommended reducing the required hours for operators, and the Department believes that the adopted rule is a logical extension of this recommendation.

Another continuing education provider objects to the reduction of hours for operators. The commenter raises the issue that the number of hours for instructors has not been considered for reduction.

Department response: The Department disagrees with the comment to the extent that the commenter objects to the reduction of hours. The Department believes that reducing the number of continuing education hours for operators as stated in the adopted rule is warranted and would provide a sufficient level of continuing education. The commenter's point about instructor hours not being addressed in the proposed rules is well taken. The adopted rule reduces the total number of instructor hours to six, as with the other license types. In the adopted rule, the instructor hours are focused exclusively on Sanitation, law and rules, and teaching methods. With this concentrated focus on the most relevant topics, the Department believes that a six-hour requirement for instructors is sufficient.

Another continuing education provider (and licensed operator and instructor) also objects to reducing the required continuing education hours for operators.

Department response: The Department disagrees with the comment and believes that reducing the number of continuing education hours as stated in the adopted rule is warranted.

The amendments and new rule are adopted under Texas Occupations Code, Chapters 51, 1602, and 1603, which authorize the Department to adopt rules as necessary to implement those chapters and any other law establishing a program regulated by the Department. In particular, many of these rule changes are adopted to implement the provisions of House Bill 2106, 80th Legislature.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1602, and 1603. No other statutes, articles, or codes are affected by the adoption.

§83.22. License Requirements--Beauty Salons, Specialty Salons, Dual Shops, Mobile Shops, and Booth Rentals (Independent Contractors).

(a) To be eligible for a beauty salon, specialty salon, dual shop, mobile shop, or booth rental license, an applicant must:

(1) obtain the current law and rules book;

(2) comply with the requirements of the Act and this chapter;

(3) submit a completed application on a department-approved form;

(4) pay the fee required under §83.80; and

(5) for a booth rental license, hold an active department-issued cosmetology license.

(b) In addition to the requirements of subsection (a), a dual shop license applicant must comply with the requirements to the Act, this chapter, Texas Occupations Code, Chapter 1601, and 16 TAC Chapter 82 for obtaining a beauty salon license and a barbershop permit.

(c) In addition to the requirements of subsection (a), a mobile shop license applicant must:

(1) provide a permanent physical address from which the mobile unit is dispatched and to which the mobile unit is returned when non in use;

(2) provide a permanent mailing address where correspondence from the department may be received; and

(3) verify that the mobile shop complies with the requirements of the Act and this chapter.

§83.25. License Requirements--Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title (relating to Continuing Education Requirements), unless the context indicates otherwise.

(b) To renew an operator or instructor license that expires prior to September 1, 2008, a licensee must complete a total of 12 hours of continuing education through department approved courses, of which 4 hours must be in Sanitation required under the Act and 16 TAC Chapter 83.

(c) To renew a manicure instructor specialty license, manicurist specialty license, facial instructor specialty license, facialist specialty license, hair weaving specialty certificate, hair braiding specialty certificate, wig specialty certificate, and shampoo/conditioning specialty certificate that expires prior to September 1, 2008, a licensee must complete a total of 8 hours of continuing education through department-approved courses, of which 4 hours must be in Sanitation required under the Act and 16 TAC Chapter 83.

(d) If a licensee holds an instructor license, facial instructor specialty license, or manicure instructor specialty license that expires prior to September 1, 2008, then, of the total hours required under subsection (b) or (c), the licensee must complete 2 hours in Methods of Teaching in accordance with §83.120.

(e) To renew an operator license, manicurist specialty license, facialist specialty license, hair weaving specialty certificate, hair braiding specialty certificate, wig specialty certificate, or shampoo/conditioning specialty certificate that expires on or after September 1, 2008, a licensee must complete a total of 6 hours of continuing education through department-approved courses. The continuing education hours must include the following:

(1) 2 hours in Sanitation required under the Act and 16 TAC Chapter 83;

(2) 2 hours in the Act and 16 TAC Chapter 83, addressing topics other than Sanitation; and

(3) 2 hours in any topics listed in subsection (j).

(f) To renew an instructor license, manicure instructor specialty license, or facial instructor specialty license that expires on or after September 1, 2008, a licensee must complete a total of 6 hours of continuing education through department-approved courses. The continuing education hours must include the following:

(1) 2 hours in Sanitation required under the Act and 16 TAC Chapter 83;

(2) 2 hours in the Act and 16 TAC Chapter 83, addressing topics other than Sanitation; and

(3) 2 hours in methods of teaching in accordance with §83.120.

(g) For a timely or a late renewal, a licensee must complete the required continuing education hours within the two year period immediately preceding the renewal date.

(h) A licensee may receive continuing education hours in accordance with the following:

(1) A licensee may not receive continuing education hours for attending the same course more than once.

(2) A licensee will receive continuing education hours for only those courses that are registered with the department, under procedures prescribed by the department.

(i) A licensee shall retain a copy of the certificate of completion for a course for two years after the date of completion. In conducting any inspection or investigation of the licensee, the department may examine the licensee's records to determine compliance with this subsection.

(j) To be approved under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the following topics:

(1) Sanitation required under the Act and 16 TAC Chapter 83;

(2) the Act and 16 TAC Chapter 83, addressing topics other than Sanitation;

(3) the curriculum subjects listed in §83.120.

(k) A registered course may be offered until the expiration of the course registration or until the provider ceases to hold an active provider registration, whichever occurs first.

(l) A provider shall pay to the department a continuing education record fee of $5 for each licensee who completes a course for continuing education credit. A provider's failure to pay the record fee for courses completed may result in disciplinary action against the provider, up to and including revocation of the provider's registration under Chapter 59 of this title.

(m) Notwithstanding subsections (b) - (f) a licensee may satisfy the continuing education requirement for renewal by completing two hours of Sanitation in department-approved courses, if the licensee:

(1) is at least 65 years of age; and

(2) has held a cosmetology license for at least 15 years.

§83.78. Responsibilities of Mobile Shops.

(a) A mobile shop shall comply with all health and safety requirements and all other requirements of the Act and this chapter for beauty salons or specialty salons, as applicable, except as modified by this section or as otherwise indicated.

(b) A mobile shop license holder shall maintain a permanent physical address as required by §83.22(c). The mobile shop shall notify the department in writing of any change in physical or mailing address within 10 calendar days of the change.

(c) Records of the following shall be kept within the mobile unit and made available for inspection by department personnel: appointments; itineraries, if the shop submits itineraries to the department as provided by subsection (d); license numbers of employees and independent contractors; and vehicle identification numbers of the mobile shop. Records of appointments and itineraries shall be kept for a period of at least one year from the date the record is made.

(d) A mobile shop shall either:

(1) have a Global Positioning System (GPS) tracking device that enables the department to track the location of the mobile shop over the Internet and meet the following requirements:

(A) the device shall be on board and functioning at all times the mobile shop is in operation or open for business; and

(B) the mobile shop shall provide the department with all information necessary to track the shop over the Internet; or

(2) submit to the department, in a manner specified by the department, a weekly itinerary showing the dates, exact locations, and times of service to be provided. The license holder shall submit the itinerary not less than 7 calendar days prior to the beginning of service described in the itinerary and shall submit to the department any changes in the itinerary not less than 24 hours prior to the change. A mobile shop shall follow the itinerary in providing service.

(e) Furniture shall be anchored to the unit.

(f) All chemicals in the mobile shop shall be stored in cabinets secured with safety catches and shall be stored separate and apart from other articles or equipment in the shop.

(g) A mobile shop shall display on both sides of the exterior of the mobile shop, the mobile shop's license number and a sign stating the name of the shop.

(h) A mobile shop shall have a water heater that provides fresh, hot water continuously and on demand.

(i) A mobile unit shall have a fresh water tank holding a sufficient amount of fresh water to perform the day's business. If a mobile unit's fresh water supply is depleted, operation must cease until the supply is replenished.

(j) A mobile shop shall have a functioning restroom within its perimeter, including a self-contained, flush toilet with holding tank.

(k) No services may be performed outside the mobile shop or while the mobile shop is in motion.

(l) A mobile shop may not be used as a residence or for any other purpose besides providing cosmetology services.

§83.80. Fees.

(a) Application fees.

(1) Operator License--$53

(2) Facialist Specialty License--$53

(3) Manicurist Specialty License--$53

(4) Hair Weaving Specialty Certificate--$53

(5) Hair Braiding Specialty Certificate--$53

(6) Wig Specialty Certificate--$53

(7) Shampoo-Conditioning Specialty Certificate--$53

(8) Student Permit--$25 (includes law and rules book fee)

(9) Instructor License--$70

(10) Facial Instructor Specialty License--$70

(11) Manicure Instructor Specialty License--$70

(12) Examination Proctor Registration--$25

(13) Beauty and specialty salons--$106

(14) Booth Rental (Independent Contractor) License--$67

(15) Private Beauty Culture School--$500

(16) Dual Shop--$130

(17) Mobile Shop--$106

(b) Renewal fees.

(1) Operator License--$53

(2) Facialist Specialty License--$53

(3) Manicurist Specialty License--$53

(4) Hair Weaving Specialty Certificate--$53

(5) Hair Braiding Specialty Certificate--$53

(6) Wig Specialty Certificate--$53

(7) Shampoo-Conditioning Specialty Certificate--$53

(8) Student Permit--No charge.

(9) Instructor License--$70

(10) Facial Instructor Specialty License--$70

(11) Manicure Instructor Specialty License--$70

(12) Examination Proctor Registration--$25

(13) Beauty and specialty salons--$69

(14) Booth Rental (Independent Contractor) License--$67

(15) Private Beauty Culture School--$200

(16) Dual Shop--$100

(17) Mobile Shop--$69

(c) License by Reciprocity or Endorsement--$100

(d) Inactive License Status

(1) Change from active status to inactive status--No charge

(2) Renewal of license on inactive status--Renewal fees as stated in subsection (b)

(3) Change from inactive status to active status--$25

(e) Revised/Duplicate License/Certificate/Permit/Registration--$25

(f) Law and Rules book--$14

(g) Inspection Fees (for each occurrence)

(1) School (public and private)--$200

(2) Risk-based Inspection of establishments--$150

(h) Verification of license, permit, or certificate to other states--$15

(i) Student transcript fee--$5

(j) Registered Examination Proctor Department training course--$50

(k) Late renewals fees for licenses under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(l) All fees are nonrefundable, except as otherwise provided by law or commission rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7348

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CHAPTER 84. DISCOUNT HEALTH CARE CARD PROGRAM

16 TAC §§84.1, 84.10, 84.20, 84.21, 84.70 - 84.75, 84.80, 84.90, 84.91

The Texas Commission of Licensing and Regulation ("Commission") adopts new 16 TAC Chapter 84, §§84.1, 84.73, 84.80, 84.90 and 84.91, regarding the discount health care card program, without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7631), and will not be republished.

The Commission also adopts new 16 TAC Chapter 84, §§84.10, 84.20, 84.21, 84.70 - 84.72, 84.74 and 84.75 with changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7631) and will be republished.

Discount health care card programs are non-insurance programs that offer consumers access to health care services at discount rates. Under these programs, consumers pay a one-time enrollment fee and ongoing membership fees. In exchange for these fees, consumers receive a discount health care card that may be presented to receive discounts on specific health care services that are provided by specific health care providers who agree to provide discounts under the programs.

These rules are necessary to implement House Bill 3064, ("HB 3064") 80th Legislature, Regular Session, 2007, which creates a new regulatory structure for discount health care card programs. HB 3064 provides for the registration of discount health care card program operators with each of their programs and for the regulation of these programs' operations.

Section 84.1 sets out the authority of the Texas Department of Licensing and Regulation ("Department" or "TDLR") and its governing body, the Commission, to establish these rules. The Legislature directed the Commission to adopt the rules necessary to implement the provisions in HB 3064, and the Commission has the authority to do so under Texas Occupations Code, Chapter 51.

Section 84.10 defines the following terms as used in the statute and the rules: "Act," "Clear and conspicuous," "Complainant," "Complaint," "Discount," "Discount health care card program," "Discount health care card program operator," "Health care services, "Membership card," "Membership fee," "Nominal one-time enrollment fee," and "Valid cancellation notice." As a result of public comments, the definition of "discount" was amended to add a sentence recognizing other possible reductions in price that may be offered to some consumers by some providers (e.g., friends and family, seniors, long-time patients) that are not included in the definition of discount. The definition of "health care services" was amended to add a clarification regarding services being provided by providers within their licensed scope of practice. The definition of "valid cancellation notice" also was revised to remove the substantive requirements regarding addressed and postage-paid postcards or letters and clear and conspicuous instructions. Program operators must still provide a written cancellation policy in accordance with §84.70.

While HB 3064 defined several important terms, the Department further clarified these terms, as necessary, and added additional terms and definitions in order to eliminate any confusion for program operators, regulators and consumers. The Department worked with the Office of the Attorney General ("OAG") on the definitions of "clear and conspicuous" and "discount" to coordinate with the OAG's litigation efforts.

Section 84.20 establishes the registration requirements for discount health care card program operators. A program operator must submit the information specified in this section that includes: (1) an application containing all assumed names currently or intended to be used by the program operator, the name of each discount health care card program that the program operator intends to offer or operate, and all private label names used for the program; (2) a registration fee; (3) a surety bond; (4) a copy of the written disclosure materials that will be provided to members; (5) the toll-free telephone number and Internet website that members can use to obtain information about the program and participating providers; (6) a list of providers or networks that have agreed to provide health care services under the program; (7) a copy of the program application given to potential members; and (8) the program's complaint resolution procedures. The registration is valid for one year and must be renewed annually. As a result of public comments, program operators, not programs, must register with the Department. In addition, the program operator does not need to submit a copy of each type of membership card issued under the discount health care card program, or any other information the department determined necessary.

HB 3064 listed the required information that program operators must submit to the department and provide to consumers in order to have an active and valid registration. These rules consolidate the registration requirements in one section for clarity and administrative ease. They also require program operators to provide copies to the Department of the materials required to be provided to consumers as part of the initial registration.

Section 84.21 establishes the annual renewal registration requirements for a discount health care card program operator. These requirements include submission of: (1) a renewal application; (2) a registration fee; (3) a surety bond; and (4) an updated version of any information previously provided to the Department that has changed since it was submitted to the Department. As a result of public comments, the renewal is for program operators not programs.

The Department established the renewal registration requirements, because HB 3064 requires annual registration and payment of an annual fee. The renewal registration does not require program operators to provide as much information as the initial registration, but the Department is required to obtain any information that has changed or been updated since initial registration or the last renewal. HB 3064 requires the program operators to maintain a surety bond, and since most bonds are written for a one-year period, the Department requires a new bond or a continuation statement that the bond for the previous year is still valid and in effect.

Section 84.70 requires the program operator, not later than 15 days after enrolling a member, to provide the member with a membership card and written materials describing the program. The written materials must include the following statements: (1) the discount health care card program is not insurance; (2) the member has the right to cancel the membership; and (3) the Department regulates discount health care card programs. This rule also requires the program operator to have a written cancellation policy, which identifies how the member may cancel the membership and provides for a refund of all membership fees paid other than the nominal one-time enrollment fee. As a result of public comments, the statement regarding unresolved complaints concerning a program or program operator being addressed to the Department was deleted. In addition, the details regarding the font size, placement on the page, and mandated verbatim language for the consumer disclosures has been eliminated. The provision requiring the program operator to send current members a copy of the complaint resolution procedures also has been eliminated.

The rule mandates important consumer disclosures and protections that are also required under the statute. For all of its regulated programs, the Department requires the regulated entity to disclose that the Department regulates this program and to provide the Department's contact information. That business practice is applicable to the discount health care card program too. In addition, the Department believes that in order to fulfill the purpose of the 30-day refund requirement created by the Act, a new member must have received the statutorily required disclosure material in sufficient time to review the material and to act on such information before the 30-day period expires. Therefore, the Department interprets the Act to authorize the Department to impose a 15-day time period on program operators to provide disclosure material to new members in order to implement the intent of the Legislature.

Section 84.71 requires each discount health care card program to implement and maintain a written complaint resolution procedure. This section sets out the minimum standards regarding how long the program operator has to respond to and resolve a complaint. As a result of public comments, the program operator must submit its complaint resolution procedures, not the procedures for each program. In addition, the general requirements remain intact, but the provisions detailing the complaint acknowledgement letter and the postage-paid envelope and form for oral complaints have been deleted. The provision regarding complaints involving payment of emergency and urgent care also has been eliminated.

HB 3064 states that each program operator must "establish and operate a fair and efficient procedure for resolution of complaints." While the Department wants to allow operators flexibility in their business practices, the Department also believes this rule establishes minimum standards for the operators' complaint resolution procedures to ensure they are "fair and efficient" in order to implement the Act.

Section 84.72 requires each program operator to obtain and maintain a surety bond in the amount of $50,000. As a result of public comments, the tiered surety bond structure that was originally proposed has been eliminated. The proposed rules required each program operator to maintain a surety bond based on the number of membership cards that the program operator has issued. Now all program operators must obtain a $50,000 surety bond. In addition, clarifications have been made stating that the surety bond is payable to the Executive Director of the Department and that claims may be made against the surety bond for one year after the program operator's registration expires or is terminated.

HB 3064 states that program operators must maintain surety bonds in the amount of at least $50,000 for the payment of consumer claims. This amount is a minimum not a set amount. TDLR had proposed tiered surety bond requirements starting at $50,000, which are based on the number of members a program operator has and therefore the potential amount of risk for consumer claims. That being said, TDLR has not determined that the likelihood for a larger surety bond is needed at this time. TDLR has eliminated the tiered surety bond structure and has replaced it with a flat $50,000 surety bond for all program operators. TDLR may amend the rules in the future if it determines that a larger surety bond is necessary.

Section 84.73 requires all discount health care card program advertising to be in plain language, clear and conspicuous, and non-deceptive. This section lists prohibited advertising practices for program operators and marketers.

Many of the practices in this list are examples of prohibited practices that are included in HB 3064. The Department added other examples of prohibited practices in order to offer more guidance to program operators, marketers, regulators, and consumers. The lists in the statute and in the rules are examples of prohibited practices and are not exhaustive lists.

Section 84.74 requires a program operator to maintain copies of all records to be available for inspection by the Department. These records include lists of adversarial proceedings against the program operator, copies of contracts with providers and marketers, copies of marketing materials, lists of requests for refunds, and lists of complaints. As a result of public comments, records for requests for refunds and records of complaints still must be maintained, but the formatting requirements for these records have been deleted.

The Department finds that this information is necessary in order to ensure compliance with the law and to highlight problems occurring in or outside the state with program operators doing business in Texas. While this information is important, the Department does not find it necessary for the program operators to periodically file the information with the Department. To do so, would be overly burdensome to the Department and to program operators.

Section 84.75 requires a program operator to file certain reports at specified times. As a result of public comments, reports that were to be submitted every month will now be submitted within thirty days of any change. These reports include any new programs being offered or operated, any new private label names being used, any programs no longer being offered or operated, and any private label names no longer being used. Reports that were to be submitted quarterly will now be submitted semi-annually, annually, or not at all. Semi-annual reports include lists of current providers and marketers and lists of providers who are no longer participating in the program. Annual reports include the total number of active discount health care cards. Reports that have been deleted are the number of membership cards issued for the quarter and a list of the marketers previously marketing the discount health care card program that are no longer doing so.

The Department finds that this information is necessary in order to respond to consumer inquiries regarding whether a program is registered with the Department. The information is also necessary to identify trends and to highlight potential problems occurring with program operators doing business in Texas. The Department has determined that this information should be reported to the Department rather than just maintained as a record.

Section 84.80 establishes the fees for initial registrations ($1,000), renewal registrations ($500), duplicate registrations ($25), and late renewals (expired 90 days or less, $750; expired more than 90 days but less than one year, $1,000).

HB 3064 set the initial registration fee at $1,000 per program and the renewal fee at an amount not to exceed $500 per program. The Department interprets this provision to require the registration fee to be paid per program operator. The duplicate fee is the same as for the Department's other programs. The late renewal fee for discount health care card programs uses the same formula for calculating late fees as the Department's other programs.

Section 84.90 provides the grounds for denying an initial or renewal registration include incomplete or falsified information. This section also states that administrative penalties and/or sanctions may be imposed against a person that violates the statute or the rules. This authority is already found in the Department's general authority under Texas Occupations Code, Chapter 51 and 16 TAC Chapter 60, but it has been repeated in this particular rule for clarity and administrative ease.

Section 84.91 describes the Department's authority to conduct inspections and investigations as necessary to enforce the statute and the rules. This section further states that the Department, during reasonable business hours, may enter the business premises of a program operator or person suspected of violating the statute or rules and examine and copy records pertinent to the inspection or investigation. This authority is already found in the Department's general authority under Texas Occupations Code, Chapter 51 and 16 TAC Chapter 60, but it has been repeated in this particular rule for clarity and administrative ease.

The proposed rules were published in the *Texas Register* on October 26, 2007. The public comment period closed on November 26, 2007. The Department held a public hearing on November 28, 2007, in response to a request and in accordance with the Texas Administrative Procedures Act, Texas Government Code §2001.029(b). Below is a summary of the comments by section and the Department's responses to the comments.

General Comments

TDLR received two general comments concerning the administrative burden and costs of the rules. Consumer Health Alliance ("CHA") expressed concerns about the amount of information requested to be filed with TDLR, which would result in administrative burdens for both the companies and TDLR. CHA and Careington International Corporation ("Careington") stated that Texas would become the most expensive state to do business for discount health care programs if these rules are adopted. Careington stated that it will not continue to operate in Texas if these rules are adopted.

Department's Response: TDLR has revised the rules, as noted in the specific sections below, so that the rules are less administratively burdensome and less expensive for compliance purposes.

The National Association of Dental Plans ("NADP") submitted a comment applauding TDLR for issuing regulations that are similar to the NAIC Discount Medial Plan Organization Model Act. However, NADP expressed concerns with specific provisions of the rules that differ from the NAIC Model and that will increase the costs of a dental discount program.

Department's Response: While TDLR has reviewed the NAIC Model and respects the statutes and rules that other states have enacted and adopted, TDLR must adopt rules based on the statute that the Texas Legislature enacted. There are differences between the NAIC Model and the Texas statute, so there are differences between the NAIC Model and the TDLR rules. TDLR has revised rules, as noted in the specific sections below, so that the rules are less administratively burdensome and less expensive for compliance purposes.

Ameriplan and Association Health Care Management (AHCM) submitted comments expressing appreciation for the rules, because they would allow legitimate businesses to keep operating and would keep the "bad actors" out of Texas. Ameriplan stated that it already has many of the requirements found in the rules as part of its business practices. AHCM only expressed concerns that registered companies are under more strict requirements than rogue entities.

Department's Response: TDLR appreciates the support for the rules, and it takes unlicensed and unregistered activities very seriously. TDLR conducts sting operations and other investigation to stop unlicensed activities and will do for companies that are offering or operating discount health care card programs but are not registered in Texas with TDLR.

CHA also expressed general concerns that the rules create standards for the operation of discount health care programs which "usurp the role of the Attorney General". The rules enhance TDLR's enforcement authority and "erode the Attorney General's (AG) enforcement authority under DTPA".

Department's Response: TDLR has worked closely with the OAG on the development of these rules. OAG has enforcement authority under the Deceptive Trade Practices Act, and TDLR has enforcement authority under HB 3064, codified as Health and Safety Code Chapter 76. The Legislature gave regulatory authority to TDLR over a previously unregulated industry. Prior to the passage of the HB 3064, OAG filed suit for violations under the DTPA since that was the only enforcement option. With the passage of HB 3064, TDLR has regulatory and enforcement authority under Health and Safety Code, Chapter 76, and the OAG has enforcement authority under DTPA, Business

and Commerce Code, Chapter 17. HB 3064 clearly states that OAG still has jurisdiction to sue under DTPA, but it is not the only state agency that can take enforcement action. TDLR is not usurping the role of OAG or eroding OAG's enforcement authority. The Legislature knew that when it passed HB 3064, it was giving enforcement authority to TDLR in addition to the authority already held by OAG.

The National Council of Prescription Drug Programs (NCPDP) expressed concerns over §76.054(3)(B)(ii) of the Act. This subsection requires a program operator of a prescription drug program to include on the membership card the international identification number assigned by the American National Standards Institute for the entity administering the prescription drug benefits. NCPDP believes there was an accidental omission in this section, since there are two accepted issuers of numbers, the American National Standards Institute and the NCPDP. NCPDP believes mandating the use of an international identifier for a US-based business would be a problem for many pharmacy benefit managers that administer pharmacy plans today using the NCPDP number. NCPDP also states that legislating the international number as the only valid identifier could inadvertently put some existing businesses at risk of being non-compliant with the legislation and therefore technically ineligible to perform pharmacy discount card business in the State of Texas.

Department's Response: While TDLR appreciates the comments submitted by NCPDP, the organization's concerns are with the Act not the rules. The Act is clear about what identification number must be included on the membership card for prescription drug discount programs. TDLR cannot change this statutory requirement by rule.

Specific Comments by Section

§84.10. Definitions.

CHA and AHCM submitted comments opposing the inclusion of the definition of "clear and conspicuous" under §84.10(2). CHA stated that this definition includes specific unnecessary requirements on electronic advertising that would require changes to national advertising. CHA stated that the definition of "clear and conspicuous" should be left to the Office of the Attorney General (OAG) to define and enforce under the Deceptive Trade Practices Act, and that the AG should be the entity to determine whether materials are misleading to consumers. AHCM stated that the definition made the Act more difficult to understand and that no other state defines this term.

Department's Response: TDLR coordinated with the Office of the Attorney General (OAG) to develop the definition of "clear and conspicuous" to reflect the standard applied by the Texas Attorney General. This definition clarifies what is meant by "clear and conspicuous" as it applies to various marketing and advertising mediums. While the OAG should determine what materials are misleading under the Deceptive Trade Practices Act under the Business and Commerce Code, Chapter 17, TDLR determines what materials are misleading under the Discount Health Care Program Act, Health and Safety Code Chapter 76. No changes will be made to the rule based on this comment.

CHA submitted a comment that the definition of "complainant" under §84.10(3) protects any person, including unrelated third parties, who have a concern with a discount health care program. This definition would require program operators to respond to individuals or groups who have no relationship with the program.

Department's Response: A program operator should expect to address complaints by individuals who may not be members or participating providers, but who have complaints against the program operator, its marketers and/or their business practices. One example is a provider who is not a participating provider and has no intention of becoming a participating provider, but the program operator or its marketers are telling consumers that the provider is a participating provider. TDLR believes there are people other than members and participating providers who may have complaints, so the definition is necessary. No changes will be made to the rule based on this comment.

AHCM submitted a comment about the definition of "complaint" under §84.10(4). AHCM commends TDLR on providing a definition as all other states have failed to do; however, the first sentence is too far reaching with "any dissatisfaction" and it undermines subparagraphs (A) and (B), which attempt to limit and further define complaint. AHCM suggests removing the first sentence, since it is burdensome and "economically devastating" when implemented with the Complaint Resolution Procedures in §84.71.

Department's Response: TDLR believes that the first sentence needs to be read in conjunction with the rest of the definition and that the definition is not overreaching when read as a whole. TDLR has significantly amended the Complaint Resolution Procedures in §84.71, so the definition of "complaint" when implemented with the §84.71 requirements should not be burdensome and "economically devastating." No changes will be made to the rule based on this comment.

CHA submitted a comment that the definition of "discount' under §84.10(5) is unclear. The definition tries to base the discount on the amount charged to a customer who does not have insurance and who pays in cash. Whether a customer gets a cash discount, however, varies by customer and by provider. Some providers may give discounts to frequent customers, or seniors, or other individuals. Discount programs operators need to be able to advertise average discounts, without having to worry that the advertising would be considered deceptive because there is someone who would already receive some of that discount from a provider. CHA stated that if a definition is to be maintained in the rules, it should be based on the amount "generally available to consumers."

Department's Response: TDLR coordinated with the Office of the Attorney General to develop the definition. TDLR believes it is important to include this definition so that consumers have a defined basis to compare products and so that industry, consumers, and regulators and can determine what price is actually being used as the starting point to which the discount will be applied. TDLR has added a clarification to the definition that recognizes that some providers may give some customers other reductions in price that are not associated with the discount health care card.

CHA submitted comments regarding the definitions of "discount health care card program" and "discount health care card program operator" under §84.10(6) and (7). CHA states that it is unnecessary to change the legislation's definitions to insert the word "card."

Department's Response: TDLR believes the clarification is necessary. These programs do not offer discount health care; they offer discount health care CARDS that members can present to participating providers to receive discounts. These programs are

not health insurance. Clarifying the definitions identifies the purpose and scope of these programs.

Texas Medical Association ("TMA") submitted a comment regarding the definition of "health care services" under §84.10(8). TMA stated the term is defined in a manner that bundles all of the various services offered by healing arts professions into a single paragraph. TMA offered language to clarify that this regulation so that if would not unintentionally permit a person who may be licensed in one profession to perform activities that are mentioned in the rule, but are not within the scope of that person's license.

Department's Response: TDLR has added the suggested clarification that these services are provided by health care providers in accordance with the scope of practices permitted by the appropriate licensing Act.

CHA commented on the definition of "membership fee" under §84.10(10). CHA stated that this definition describes reoccurring payments as monthly payments. These payments may be for other terms, such as quarterly, semi-annually, or annually.

Department's Response: TDLR had inserted monthly payments in parentheses as an example of reoccurring payments. It did not intend for this to be read as the only payment frequency. TDLR has clarified this definition to recognize other reoccurring periodic payments.

CHA, the National Association of Dental Plans ("NADP"), and AHCM submitted comments opposing the definition of "valid cancellation notice" under §84.10(13). CHA stated that this definition imposes a costly new requirement that discount program operators give each member an addressed and postage-paid postcard or letter to make it easier for the member to cancel the program. These requirements would be costly to implement, since they are not required by any other state. Program operators already provide members with information about how to cancel the program.

NADP agrees plans should be mandated to explain how to cancel their membership to members in a clear and conspicuous manner, but NADP opposes the requirement for specified forms and prepaid postage. Discount plans typically receive member cancellations from telephone calls and the internet. The requirement for specified cancellation forms, including prepaid postage, is not beneficial to the members, and extremely costly to the plan. These costs could get passed on to the consumer.

AHCM stated that the definition did not just define the term, but it imposed additional requirements for discount programs. AHCM also opposed the addressed postage-paid postcard for cancellation. This requirement is onerous and has not been implemented in any other state. This requirement would elevate the cost for the program operator and the consumer. AHCM believes alternative methods of cancellation would be more cost-effective.

Department's Response: TDLR has significantly scaled back this definition in response to the comments. The substantive requirements regarding addressed, postage paid cancellation cards and letters have been removed. Program operators still will be required to provide members with information about how to cancel their memberships as specified under §84.71, which has also been amended.

§84.20. Registration Requirement--Program Operator.

TDLR received three comments opposing the registration of programs, rather than program operators, due to the costs and the administrative burden. CHA commented that §84.20(a) requires a separate registration not for each discount health care program operator, but for each discount health care program. This dramatic expansion of the registration process is unwarranted and unsupported by the legislation. Some discount program operators have hundreds of clients who are marketing their programs, and many of those marketers sell several different programs, typically reflecting different packages of benefits. As TDLR is well aware, the fiscal analysis for HB 3064 estimated 50 companies would register, raising revenue of $50,000. At best, the proposed rules appear to be an attempt to change the law to raise additional funds. No other state requires registration by program.

CHA also commented that the preamble of the proposed rules states that the fees have been set to generate revenues sufficient to cover $280,000 in annual costs of regulating the industry. There are at least two major problems with this statement. First, the legislation does not authorize the fees to be set to cover a certain amount of costs. The statute requires discount program operators to pay a fee, and sets the fee at $1,000. Second, TDLR's assumption of $280,000 annual costs is unrealistically high. The Florida Office of Insurance Regulation, which implements the most extensive discount program regulation in the country, dedicates less than one FTE to the regulation of discount programs. This calls into question TDLR's assertion that 4 FTEs are necessary to regulate discount programs, and further validates the fiscal note which states that the $50,000 in estimated revenue (50 operators x $1,000) will be adequate to fund the regulatory program.

Careington commented that its biggest concern with the rules is registration fee being paid per program rather than per program operator. Careington has 362 programs, so the initial registration fees for all of its programs would be $362,000, and the renewal fees would be $180,000. Careington also expressed concerns about submitting registration materials for 362 programs, especially when the programs are the same except for the names.

AHCM expressed concerns that registering each program would be burdensome, not cost-efficient, and detrimental to members. AHCH stated that program operators currently hold contracts with various provider networks, individual providers, and marketers, and discount programs offer various combinations of services to meet their members' needs. Registering every program would force program operators to provide a one-size fits all plan, eliminating service and pricing flexibility for members. Other states have a single registration fee for a program operator. The rules would require an exorbitant fee for discount plans.

Department's Response: The provisions of HB 3064 are ambiguous as to whether a "program operator" is required to register with TDLR or whether each "program" is required to be register with TDLR. For example, while §76.101(a) of the Act requires program operators to register with TDLR, §76.101(e) of the Act requires the $1,000 registration fee to be paid per program. TDLR is required to interpret these provisions in a manner that will effectively implement the regulatory structure intended by the Legislature. The comments submitted appear to misconstrue the definition of "program." As defined by the Act, "program" refers to the contract or business arrangement that creates a discount for a health care service. TDLR construes "program" to be the discount that a program operator offers for a particular health care service, i.e., a dental program or vision program. TDLR recognizes that a program operator may offer a dental program through multiple private labels and/or multiple marketers. TDLR has not intended to identify each private label

or marketing entity as a separate program. Rather, TDLR has construed "program" to be the discount for dental services that was created by the program operator through a contract or business arrangement that the program operator has with the dental providers or provider network. Based on the review of the materials submitted by various stakeholders as well as additional research, TDLR believes that if each program is required to be registered that most program operators would be registering 2 to 10 such programs and that the highest potential number of programs that any program operator would have to register is 40.

As for the fiscal analysis for HB 3064, the $50,000 is the projection by the Legislative Budget Board. That figure is not the fiscal analysis that TDLR presented during the legislative session, nor is it the TDLR fiscal analysis for implementing the rules. For all of the programs that it regulates, TDLR sets its fees at an amount to cover the costs of operating a particular program. By statute, each regulatory program administered by TDLR is required to be self-sufficient. The fees for one program are not used to help cover the costs of regulating another program. TDLR cannot comment on how much it costs the Florida Department of Insurance to regulate these programs. TDLR can only calculate what it will cost TDLR to implement and regulate a new program in Texas.

That being said, TDLR has decided to interpret the provisions of HB 3064 to require only that program operators register and that the registration fee therefore is to be paid per program operator, not per program. This will reduce the costs and the administrative burdens for program operators. TDLR will keep track of all its costs for registering and regulating program operators over the next calendar year and may seek additional appropriations for this program in the 2009 Legislative Session if appropriate.

Since the program operator will register only itself and not each of its programs, TDLR will require the program operator, as part of the application, to list the name of each discount health care card program, as that term is defined by the Act, that the program operator intends to offer or operate. The program operator will not register each program or pay a fee for each program; it will just identify each of its programs.

CHA submitted comments that the items required to be filed in §84.20(a)(4), (7) and (9) are burdensome and not authorized by the statute. Given the number of programs, CHA was concerned with the amount of paperwork being filed with TDLR. CHA also was concerned that much of the information requested is duplicative, since many programs have the same elements just arranged in different packages, and many of the materials used by different marketers are the same except for the name of the marketer.

Department's Response: The information in this section is required under the statute to be given either to TDLR or to the consumer. For the information that is required to be provided to consumers, there is no reason why a program operator cannot submit a copy of the same consumer materials to TDLR at registration. In response to the comment, TDLR has eliminated paragraph (7), regarding the copies of each type of membership card issued. This information is not provided to consumers nor is it information that TDLR needs since the program operator will list all the programs that it offers or operates on its application. Also in response to the comment, TDLR has clarified paragraph (9) so that the program operator submits the operator's complaint resolution process, not the complaint resolution process for each program. TDLR recognizes that the operator most likely will be using the same complaint resolution process for all of its programs.

Texas Medical Association (TMA) submitted a comment strongly supporting the inclusion of the requirement under §84.20(a)(6). This section requires program operators to submit a list of physicians and other health care providers as part of the registration criteria in addition to providing information of the networks with which they have contracted. TMA commented that it is a key patient protection to ensure that there are, in fact, physician contracts in place. Providing the name of a contracted network is insufficient. It is imperative that patients receive value for the membership/subscription fees they pay in exchange for discounts from charges for health care. TMA also suggested that the Department consider a verification process whereby a small sample of listed physicians are contacted to establish the veracity of the list.

Department's Response: TDLR appreciates the supportive comment and will consider the suggested verification process as TDLR develops it enforcement plan. CHA submitted a comment opposing §84.20(a)(10) that allows TDLR to require any other necessary information. CHA stated that there is no legislative authorization for this unlimited demand or any catch-all provision in the law.

Department's Response: At this time, TDLR believes that it will have all of the information that it needs at the time registration with the other required registration documents. TDLR will amend the rules in the future if necessary to obtain additional registration materials. In response to this comment, TDLR has deleted this provision.

§84.21. Registration Requirement--Renewal.

CHA submitted a comment regarding the renewal registration requirements under §84.21. CHA stated that the proposed rule would require re-filing thousands of pages of paper with TDLR even if only slight changes were made to the documents.

Department's Response: The renewal application process requires far fewer documents to be filed with TDLR than the initial registration. The Act requires that a condition of renewal is the submission of any changes to the registration information on file with TDLR. Contrary to the comment, this rule does not require re-filing all of the registration documents but rather requires the filing of only such information that has changed. Further, this section states that all the requested material is submitted "in the manner prescribed by the executive director" so that it can be submitted electronically over the internet if the information is available in that format. No changes will be made to this rule based on this comment.

§84.70. Responsibility of the Registrant--General.

TDLR received five comments on §84.70(a). Four commenters opposed the specific formatting standards for the disclosures. One commenter supported providing members with the information they needed in order to file a complaint.

CHA stated that the proposed rules add disclosures that are not in the statute and are unworkable for discount program operators. Section 76.053 of the statute lists 7 required disclosures that program operators must give to new members. TDLR has added additional disclosures, including mandating specific language for the disclosures. Mandated language may be contrary to the disclosures required by other states, forcing the discount program operator to create materials specific to Texas. The standards for the disclosures, which specify placement on the page,

indenting, and font size, are also too specific to allow sufficient flexibility for national programs. CHA also commented that the required disclosures include specific details about TDLR and information that is to be "stamped on" or "stapled to" the contract. CHA stated that requiring state-specific information for programs that operate nationally is extremely expensive.

Careington submitted a comment expressing concerns about the requirements about font size, verbatim language, placement of language within the document, information stapled to documents, and postage paid postcards. Careington stated that these requirements would force it to create state specific information. Careington has an automated process, and the rules would stop the process for Texas consumers and delay consumers from receiving information.

NADP submitted a comment encouraging the Department to slightly modify the requirements related to the format of the disclosures in order to maintain alignment with other states. NADP stated that by permitting discount plans to maintain their materials to NAIC standards, plans can sustain their print templates and greatly reduce the significant print costs otherwise mandated in this regulation. NADP suggested changes under §84.70(a)(1) and (2) to delete "when opened in the top one quarter of the page" and to change "fourteen-point type face" to "twelve-point type face."

AHCM submitted a comment stating that it appreciated the importance of placing disclosures on the first page of the materials and it does so in its materials; however, it opposes the specific placement on the first page and the specific font size. AHCM also opposes the verbatim cancellation language because its does not allow discount programs to provide a more detailed or comprehensive cancellation policy.

TMA commented that it strongly supports providing discount program members with the information they need to file a complaint should the discount program not provide service as it has promised.

Department's Response: TDLR believes consumer disclosures are important, but it understands the concerns about state-specific language for program operators that manage programs that are marketed nationally. Therefore, TDLR has eliminated the provisions regarding font size, placement of the statements on the page, and stamping or stapling disclosures on materials. TDLR has changed the disclosures in §84.70(a)(1)(A) and (B), regarding the discount health care card program not being insurance and the member's right to cancel the membership, from mandated verbatim language to general disclosures. However, TDLR has maintained the verbatim language in subsection (a)(2) regarding the fact that TDLR regulates this program. This language is standard for all of the programs that TDLR regulates, and TDLR will use it for the discount health care card program. TDLR believes it is important for members of the public to know who to call if they have questions or concerns. In addition, TDLR has reviewed a few discount health care card program brochures that have specific information for specific states. This is the only verbatim language that TDLR is mandating in its rules.

CHA, Careington, and AHCM submitted comments regarding §84.70(b), which requires program operators to send their current members the complaint resolution process after the operators register with TDLR. All three commenters expressed concerns about doing so. CHA stated that requiring a separate mailing to 2 million Texans is unduly burdensome, particularly when discount program operators already operate effective complaint resolution procedures. AHCM stated that it publishes its procedures on its website and provides the procedures to members in their initial membership packets and upon request. AHCM suggested simply requiring program operators to make the procedures available.

Department's Response: While TDLR believes current members should have access to the consumer complaint procedures, TDLR will not mandate a separate mailing. Program operators must provide copies of these procedures to current members upon request. TDLR has removed the requirement from the rules in response to these comments.

§84.71. Responsibility of the Registrant--Complaint Resolution Procedure.

TDLR received five comments on §84.71(a), four opposed and one in support. The four commenters opposing the rules stated that the complaint resolution procedure was too detailed, would take too long, and would be too expensive.

CHA stated that the rules describe an extraordinarily detailed complaint resolution procedure that every discount program operator is mandated to follow. No other state does this. In fact, if every state established its own detailed complaint procedures, program operators would be left with a maze of differing procedures to follow.

NADP agrees that a thorough complaint system should be required in every discount plan's structure. Plans should keep methodical records of member's grievances and a corresponding timed and systematic resolution process. However, NADP advocates deletion of the requirements for written acknowledgement of complaints within 5 days and the need for consumers to use a written Complaint Form rather than allowing the plan to simply respond to telephonic complaints. The additional written steps would slow down the process when a typical complaint can be handled in a short time frame with a couple of follow-up calls.

Careington stated that its complaints are usually resolved in 72 hours. By the time Careington could generate the acknowledgement letter that must be sent within 5 business days after receiving the complaint, the complaint would already be resolved.

AHCM stated that the postage paid postcard that would be used when there is an oral complaint is expensive. AHCM includes complaint forms in its membership packets, on its website, and upon request, but most complaints are solved within one phone call or within minimal additional follow-up. AHCM suggested that only those complaints that require escalation and take longer than five days for resolution be acknowledged in writing.

The Texas Medical Association strongly supports the five business day limit on acknowledgement of complaints in subsection (c).

Department's Response: In order to reduce costs and administrative burdens, TDLR has deleted the postage paid complaint form for oral complaints and removed the letter acknowledging the complaint within 5 business day. Program operators still must acknowledge a complaint in writing within 5 business days, as specified under revised §84.71(d), but the revised rules do not prescribe the method of written acknowledgement. For example, the written acknowledgement could be sent by letter, postcard, e-mail, or fax. TDLR believes that written documentation regarding complaints and the resolution thereof is necessary in order for TDLR to adequately enforce the requirement that program operators maintain fair and efficient complaint resolution proce-

dures. Additionally, adequate documentation serves to protect the interests of the program operators as well as consumers.

TDLR received two comments on §84.71(e). NADP and AHCM suggested striking this section as it focuses on verifying payments. A discount plan does not make payments or authorize services. The only involvement a discount plan would have related to emergency or urgent health care services is verification of the availability of a discount at a particular provider office. AHCM also stated that resolving complaints for emergency and urgent care within one business day as provided under subsection (e)(2) is not feasible.

Department's Response: TDLR agrees that this provision is more appropriate for a health insurance program. Since discount health care card programs are not insurance, TDLR has removed this provision from the rules in response to these comments.

NADP suggested that §84.71(f)(3) regarding proving "a refund or other adjustment as appropriate" being changed to providing "a refund of membership or enrollment fee."

Department's Response: In response to this comment, TDLR has clarified that the refund is of the membership fees.

TMA commented that under §84.71(g), any communications where the marketers of discount health care card programs inform the operators of a compliant, the complaint must be made in writing.

Department's Response: While TDLR appreciates the comment, TDLR will not mandate the communication methods between the marketers and the program operators. The program operators are ultimately responsible for any complaints.

§84.72. Responsibility of the Registrant--Financial Security.

TDLR received several comments on §84.72(a). The first comment was from a representative of Ameriplan, who stated that he did not understand the purpose of the surety bond provisions, since Ameriplan and other discount health care card programs are not offering insurance or paying claims.

Department's Response: The Legislature believed it was important for a program operator to obtain a surety bond. The surety bond requirement is found in the Act and has been incorporated into the rules.

The second comment was from CHA who opposed the tiered surety bond structure because it would require CHA's members to post a $150,000 bond. CHA stated that HB 3064 requires a $50,000 surety bond and that TDLR is inappropriately rewriting the legislation to require a higher bond amount.

Department's Response: HB 3064 states that program operators must maintain surety bonds in the amount of at least $50,000 for the payment of consumer claims. This amount is a minimum not a set amount. TDLR had proposed tiered surety bond requirements starting at $50,000, which were based on the number of members a program operator has and therefore the potential amount of risk for consumer claims.

That being said, TDLR has not determined that the likelihood for a larger surety bond is needed at this time. TDLR has eliminated the tiered surety bond structure and has replaced it with a flat $50,000 surety bond for all program operators. TDLR may amend the rules in the future if it determines that a larger surety bond is necessary.

TDLR received comments from NADP and AHCM stating that active membership should be the basis for determining surety bond amounts. NADP suggested changing "membership cards issued" to "active members." AHCM suggested changing "membership cards" to "active membership cards." In the alternative, AHCM requested a flat $50,000 surety bond.

Department's Response: As noted in the response to the previous comment, TDLR has eliminated the tiered surety bond structure and has replaced it with a flat $50,000 surety bond for all program operators.

The Surety & Fidelity Association of America (SFAA) submitted a comment offering clarifications for §84.72(b)(4). SFAA commented that the rule as proposed suggests that the bond is payable to either the Executive Director of the Department or any injured consumer that obtains a judgment against the program operator. Under the proposed rule, the claimant who first sues and/or settles could collect the amount of the claimant's judgment in full, reducing the amount of the penal sum available to later claimants and to the State. SFAA suggested that the Executive Director be given the exclusive right to make a claim on the surety bond so that the new Texas law is administered in a consistent manner and any recovery is prorated equally among all claimants.

Department's Response: TDLR appreciates this clarification and has made the suggested change to the rule.

SFAA also offered a clarification to §84.72(c), which requires a registered program operator to post a surety bond, payable to the executive director, to be effective for one year from the date that the program operator ceases to hold a valid and active registration in compliance with these regulations. License bonds usually run concurrently with the license period and any renewal of such periods. If the program operator's license is revoked or suspended for any reason, or simply surrendered to the Department, the license bond will generally become ineffective as the license period will have ended. Any time period specified in the regulations after the term of the license has expired must be understood to be a time within which claims can be made, but not in which new liabilities are incurred.

Department's Response: TDLR appreciates these clarifications and has made the suggested changes to the rule.

§84.73. Responsibility of Registrant--Statements, Representations, and Advertising.

TDLR received two comments on this section. CHA opposes the provisions, and TMA supports the provisions.

CHA submitted a comment stating that this section creates a long list of specific standards which presumably are intended to preclude deceptive marketing by a discount program operator. CHA stated that it is not appropriate for TDLR to create and enforce these standards. The OAG has the authority to determine what deceptive advertising is under the Deceptive Trade Practices Act, and that the OAG should have the full authority to enforce those provisions against discount program operators.

Department's Response: The list of prohibited advertising practices in the rules incorporates the list of prohibited practices that are in HB 3064. TDLR has added other prohibited practices to the list in order to offer guidance to the industry and to consumers. Neither the list in HB 3064 or in the rules is expressly, or intended to be, exhaustive. TDLR has worked closely with the OAG on the development of these rules.

While the OAG has enforcement authority under the Deceptive Trade Practices Act, Business and Commerce Code, Chapter 17, TDLR has enforcement authority under HB 3064, codified as Health and Safety Code, Chapter 76. The Legislature gave regulatory authority to TDLR over a previously unregulated industry. Prior to the passage of the HB 3064, the OAG filed suit for violations under the DTPA since that was the only enforcement option. With the passage of HB 3064, TDLR has regulatory and enforcement authority under Health and Safety Code, Chapter 76. HB 3064 clearly states that the OAG still has jurisdiction to sue under DTPA, but it is not the only state agency that can take enforcement action. TDLR is not usurping the role of the OAG or eroding the OAG's enforcement authority. The Legislature knew that when it passed HB 3064, it was giving enforcement authority to TDLR in addition to the authority already held by the OAG.

TMA submitted a comment supporting proposed subsection (a) as it requires communications be free of deception and be in plain language. Persons who purchase the program offered by marketers and operators deserve to have a full understanding of the value of their purchase. TMA also stated that it strongly supports the language in subsection (b)(2) as the number and availability of physicians and health care providers available to provide services within the program is the "heart" of the service provided by the discounts health care card operators. TMA also offered a suggestion in regard to subsection (b)(7). TMA stated that the reliance on an example rather than a set typeface size limit may cause issues with enforceability. TMA suggests the Department choose a particular type face size that it believes is readable.

Department's Response: TDLR appreciates the supportive comments. As for the suggestion regarding mandating a particular font size in subsection (b)(7), TDLR has eliminated the font size requirements found throughout these rules. TDLR will not mandate a particular font size in this subsection. TDLR will rely on the general requirement in §84.73(a) that any advertising be "clear and conspicuous" as defined in §84.10(2).

§84.74. Responsibility of the Registrant--Records.

TMA submitted a comment supporting §84.74(1), which requires a program operator to retain a list of items associated with adversarial proceedings brought against the program operator. TMA would encourage the Department to consider also requiring reporting under §84.75 of any activities taken against a program operator or against a network contracted with a program when such action is taken by regulatory or enforcement agency of any State of the United States.

Department's Response: TDLR appreciates the comment, but believes that the identified information will be useful in the context of determining compliance of particular operators rather than receiving the information periodically for all operators.

CHA submitted a comment regarding §84.74(5), which requires a program operator to keep a list of all refund requests with member contact information and details of disposition. CHA stated this provision would require many discount program operators to set up a new recordkeeping system since this information is not readily available in the specified format.

Department's Response: In response to this comment, TDLR has modified this provision to eliminate the formatting requirement. Program operators will need to maintain "records of the requests for refunds from members." In response to this comment, TDLR also made a similar change to §84.74(6) regarding records of complaints to eliminate the formatting requirements.

§84.75. Responsibility of the Registrant--Reports.

TDLR received five comments on §84.75. Four commenters stated that the reporting requirements were excessive and administratively burdensome. One commenter was in support of the reports.

CHA, Careington, NADP, and AHCM commented that this section mandates reporting unlike any other state and that reporting requirements are excessive for the nature of the discount business model. All four commenters stated that the frequency of the reporting would be burdensome to program operators and that the reports would have marginal value to TDLR or consumers. CHA suggested that TDLR use a targeted approach when problems arise, instead of requiring reports upfront. If complaints are filed against a company, TDLR, at that time, should request any and all available information to allow it to investigate and correct any deficiencies.

NADP and AHCM suggested that under subsection (b), instead of reporting the same information every calendar month, program operators should report the required information only when there are changes. NADP and AHCM also suggested that under subsection (c), quarterly reports should be changed to annual reports. CHA, NADP, and AHCM commented that subsection (c)(4) and (6), which require quarterly lists of any health care providers and marketers who are no longer participating in the program, be deleted.

While three commenters specifically wanted subsection (c)(4) removed from the rule, TMA submitted a comment supporting subsection (c)(4) as drafted. TMA commented that it is critically important that a registrant report both a list of the physicians and provider networks that are no longer participating in the discount care card program. As the Act expressly prohibits misrepresentation of the participation of a physician in the program's network, it is imperative to obtain and track such information.

Department's Response: In response to these comments, TDLR has amended subsection (b) to require reporting within 30 days of a change instead of every calendar month. Also TDLR has changed the quarterly reporting to semi-annual reporting for three requirements and to annual reporting for another. TDLR has deleted subsection (c)(6), regarding the reporting of former marketers.

§84.80. Fees.

TDLR received a comment from NADP stating that the Department's fees are excessive for this program. NADP suggested that the registration application should be $500, and the registration renewal application fee should be $350.

Department's Response: These fees are established in the statute. The statute sets the registration application fee at $1,000, and the renewal fee at no more than $500. TDLR has no flexibility on changing the initial application fee. While TDLR has some flexibility on the renewal fee amount, TDLR anticipates that the costs of operating this program will require renewal fees to be set at the maximum amount of $500. If this is not the case, TDLR can amend the rules and reduce the renewal fees in the future.

The new rules are adopted under Texas Health and Safety Code Chapter 76, which directs the Department's governing body, the Commission, to adopt rules to implement the discount health care program, and Texas Occupations Code Chapter 51, which authorizes the Commission to adopt rules as necessary to im-

plement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Health and Safety Code Chapter 76, Texas Occupations Code Chapter 51, and Texas Business and Commerce Code Chapter 17. No other statutes, articles, or codes are affected by the adoption.

§84.10. Definitions.

The following words and terms, when used in this chapter or used in the Act and applied by the commission and department, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Act--Texas Health and Safety Code, Chapter 76, Discount Health Care Programs.

(2) Clear and conspicuous or clearly and conspicuously--

(A) For print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

(B) In communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to comprehend it.

(C) In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location sufficiently noticeable for an ordinary consumer to read and comprehend it. The message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication. With regard to interactive media, the disclosure shall also be unavoidable (i.e., the disclosure appears on the screen without the need to click on an icon to view the terms of the disclosure).

(3) Complainant--Any potential, current or former member, or any potential, current or future provider, or any other person who files a complaint with a discount health care card program operator.

(4) Complaint--Any dissatisfaction expressed orally or in writing by a complainant to a discount health care card program operator regarding any aspect of the discount health care card program.

(A) The term includes any dissatisfaction by any complainant relating to the availability of contracted discounts or services or other matters relating to the statements, representations, or contractual obligations of a discount health care card program to members or providers. Examples of complaints include, but are not limited to, the following:

(i) a member experiences difficulty in locating a provider in his or her geographic area that accepts the discount health care card program card;

(ii) a member does not obtain the advertised discount;

(iii) a member has difficulty getting a provider that is under contract with a program to accept the discount health care card program card;

(iv) a member questions the program operator's billing practice including continued billing after termination of membership; or

(v) a member has difficulty terminating membership and/or obtaining a refund.

(B) The term does not include:

(i) a misunderstanding or a problem of misinformation that is resolved promptly by clearing up the misunderstanding or supplying the appropriate information to the satisfaction of the potential complainant; or

(ii) a member's oral or written expression of dissatisfaction or disagreement regarding the type or quality of the health care service provided by a provider.

(5) Discount--The difference between the amount paid by a consumer who has no contractual relationship with a third-party payor and pays in cash or its equivalent at the time of service, and the amount paid by a consumer who presents the discount health care card at the time of service and pays for the service in cash or its equivalent. This discount does not include or take into account other possible reductions in price that may be available or offered to some consumers by some providers, such as discounts for seniors, family and friends, or long-time patients.

(6) Discount health care card program--A discount health care program as defined by the Act.

(7) Discount health care card program operator--A discount health care program operator as defined by the Act.

(8) Health care services--Services, supplies, products and procedures for the diagnosis, prevention, treatment, cure or relief of a health condition, illness, injury or disease provided by health care providers in accordance with the scope of practices permitted by the appropriate licensing Act. Health care services include but are not limited to dental and eye care, physician care, chiropractic care, products and services provided by and through hospitals or laboratories, and prescription drugs and pharmaceutical services, supplies, and products.

(9) Membership card or discount health care card--The card that a member receives in exchange for paying a nominal one-time enrollment fee plus membership fees and that entitles the member to receive discounts on specific health care services provided by specific providers pursuant to the discount health care card program.

(10) Membership fee--All fees, dues, charges or monies required to be paid by a consumer to the discount health care program to ensure continued membership in the program. The membership fee may be in the form of a lump sum payment or reoccurring periodic payments. The membership fee does not include money paid as a nominal one-time enrollment fee or money paid by the consumer to a provider for health care services received.

(11) Nominal one-time enrollment fee or one-time enrollment fee--All non-refundable fees, charges or monies paid by a consumer to the discount health care program related to enrollment in the program. The total amount of this enrollment fee may not exceed $60.

(12) Program operator--A discount health care card program operator.

(13) Valid cancellation notice--The method of notification from a member of a discount health care card program provided to a program operator that is required for membership cancellation.

§84.20. Registration Requirement--Program Operator.

(a) A program operator shall register with the department and shall submit all of the following to the department in the manner prescribed by the executive director:

(1) a completed application for registration which contains all the information required by §76.101 of the Act and including:

(A) all assumed names currently or intended to be used by the program operator;

(B) the name of each discount health care card program that the program operator intends to offer or operate;

(C) all private label names used for each discount health care card program; and

(D) the name, physical address, and mailing address of the program operator's agent for service of process in this state;

(2) the fee required by §84.80;

(3) a surety bond that complies with §84.72;

(4) a template of the written disclosure material required by §84.70;

(5) the toll-free telephone number and Internet website to be used by members to obtain information about the discount health care card program and confirm or find providers currently participating in the discount health care card program;

(6) the list of providers or networks that have agreed to provide health care services under the program, which may be accomplished by identification of an internet website that identifies such providers;

(7) a template of the program application form and any other membership agreements to be used for the program that comply with the requirements of §76.054(5) of the Act; and

(8) a copy of the discount health care card program operator's complaint resolution procedure that complies with the requirements of §84.71 and that is fair and efficient as determined by the executive director.

(b) The registration is valid for one year from the date issued by the department and must be renewed annually.

§84.21. Registration Requirement--Renewal.

A program operator may renew a registration if the program operator submits all of the following to the department in the manner prescribed by the executive director:

(1) an application;

(2) the fee required by §84.80;

(3) a surety bond that complies with §84.72 or a continuation certificate that is issued by the surety bond company and is satisfactory to the department to confirm the continued validity of the current bond submitted by the program operator and that identifies:

(A) the program operator as the principal for the bond;

(B) the executive director as the obligee; and

(C) a term for the succeeding year; and

(4) an updated version of any information provided to the department that has changed or been amended since the initial registration or subsequent approved renewals.

§84.70. Responsibility of the Registrant--General.

(a) No later than 15 days after enrolling a new member, a discount health care card program operator shall provide each new member a membership card and the written materials described in §76.053 of the Act, which shall include:

(1) clear and conspicuous statements that:

(A) the discount health care card program is NOT insurance; and

(B) the member may cancel the membership within 30 days after joining the discount health care card program and the member will receive a refund of all membership fees paid to the discount health care card program other than money paid as a nominal one-time enrollment fee or money paid by the member to a provider for health care services or products received;

(2) the following clear and conspicuous statement: "Note to Texas Consumers: Regulated by the Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; telephone 1-800-803-9202 or (512) 463-6599; website: www.license.state.tx.us/complaints."; and

(3) the written cancellation policy under subsection (b).

(b) A discount health care card program operator shall have a written cancellation policy which:

(1) identifies the valid cancellation notice used for the program;

(2) provides clear and conspicuous instructions to members regarding how to use the cancellation method(s);

(3) provides for a refund of all membership fees paid by a new member when the member submits to the program operator a valid cancellation notice no later than 30 days after the member receives the membership card; and

(4) states that the program operator will accept and cancel program memberships at any time during the membership period and that the program operator will cease collecting membership fees in a reasonable amount of time, but no later than 30 days after receiving a valid cancellation notice.

§84.71. Responsibility of the Registrant--Complaint Resolution Procedure.

(a) A program operator shall implement and maintain a written complaint resolution procedure approved by the department that identifies and provides reasonable procedures to investigate and resolve all complaints initiated by a complainant concerning the discount health care card program.

(b) The department may examine each discount health care card program operator's complaint resolution procedure for compliance with this section and may require a program operator to make corrections the department deems necessary.

(c) In the membership materials provided to a member or potential member, a program operator must include a description of the program operator's complaint resolution procedures and time frames.

(d) A program operator shall acknowledge a complaint in writing within 5 business days and shall investigate a complaint and provide the complainant with the results of its investigation not later than the 30th calendar day after the date the program operator receives the complaint.

(e) As part of the complaint resolution procedure, a program operator shall:

(1) record and track by date all complaints received;

(2) investigate all such complaints against the discount health care card program and take all necessary steps to resolve any and all complaints;

(3) provide a refund of membership fees as appropriate; and

(4) document how it handled each such complaint and how each complaint was resolved.

(f) The program operator shall ensure that any and all complaints concerning the discount health care card program received by its marketers are handled consistent with this section.

§84.72. Responsibility of the Registrant--Financial Security.

(a) The program operator shall maintain a surety bond, for the payment of consumer claims, in the principal amount of $50,000.

(b) The surety bond shall:

(1) be issued by a company authorized to do business as a surety in the State of Texas;

(2) conform to the Texas Insurance Code;

(3) be on a form approved by the department;

(4) be payable to the executive director for the satisfaction of eligible consumer claims:

(A) on the determination by the executive director that funds are necessary for the payment of consumer claims following compliance with Texas Occupations Code, Chapter 51, Subchapter F and the rules promulgated by the Commission; or

(B) upon final judgment against the program operator arising from a consumer claim obtained by a potential, current or former member of the program;

(5) state that the issuing company will provide the department 30 days prior written notice of its intent to cancel the bond; and

(6) be effective for the entire time period of the registration.

(c) The executive director may make claims against the bond for one year after the program operator ceases to be registered in the State, and the bond is terminated, based on actions within the registration and bond period. The aggregate liability of the surety shall be limited to the penal sum of the bond.

(d) Failure to maintain the bond for the entire time period required by this section and the Act will be cause for the executive director to institute action to impose administrative and/or civil sanctions and penalties.

§84.74. Responsibility of the Registrant--Records.

A program operator shall maintain all of its records kept in the ordinary course of business for a minimum of two years to be available for inspection by the department and such records shall include, but are not limited to, the following:

(1) a list of all adversarial proceedings in which the program operator has been named as a defendant, in this or any other state, that are pending or that have been disposed of since the registration or last renewal of the program operator's registration, including but not limited to the following:

(A) a list of all lawsuits identified by case style, cause number, jurisdiction, brief explanation of the dispute and the current status; and

(B) a list of all administrative proceedings identified by case style, cause number, agency or administrative body, jurisdiction, brief explanation of the dispute and current status;

(2) copies of the contracts with providers or provider networks;

(3) copies of the contracts with marketers currently under contract to market the discount health care card program;

(4) copies of all marketing material approved by the program operator for each marketer and documentation clearly indicating the date the material was approved by the program operator and the date such approval was provided to the marketer;

(5) records of the requests for refunds from members; and

(6) records of the complaints made to the program operator.

§84.75. Responsibility of the Registrant--Reports.

(a) Within thirty days of the change, the program operator shall report in writing to the department any change to the name or business organization of the program operator that had been identified in the application or the renewal, or any subsequent amendments thereto.

(b) Within thirty days of any change, a program operator shall provide to the department, in a manner prescribed by the executive director, the following:

(1) any new discount health care card programs being offered or operated and all private label names being used for the new discount health care card programs;

(2) any new private label names being used for any existing discount health care card programs:

(3) any discount health care card programs that are no longer being offered or operated; and

(4) any private label names that are no longer being used for the discount health care card programs.

(c) Every six months, a program operator shall provide to the department, in a manner prescribed by the executive director, the following:

(1) a list of the providers and provider networks currently under contract with the program operator for the discount health care card program, which may be accomplished by identification of an internet website that identifies such providers and networks; and

(2) a list of marketers currently under contract to market the discount health care card program.

(d) A program operator shall provide to the department, in a manner prescribed by the executive director, the total number of active members, including those members enrolled prior to the program operator's registration with the department. An initial report must be filed on September 1, 2008. After the initial report and every year afterwards, the program operator must file this report as part of its renewal registration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706343

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 1, 2008
Proposal publication date: October 26, 2007
For further information, please call: (512) 463-7348

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.11

The Texas Appraiser Licensing and Certification Board adopts amendments to §153.11, concerning Examinations, without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7643) and it will not be republished.

The adopted amendments to §153.11(b) adds language detailing the $125.00 fee associated with sitting for the state certified or licensed appraiser examination.

No written comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Appraiser Licensing and Certification Act, Subchapter D, Board Powers and Duties (Texas Occupations Code, Chapter 1103), which provides the Board with authority to adopt rules relating to certification and licensure under §1103.151.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706312
Troy Beaulieu
Attorney
Texas Appraiser Licensing and Certification Board
Effective date: December 31, 2007
Proposal publication date: October 26, 2007
For further information, please call: (512) 465-3959

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22 TAC §153.20

The Texas Appraiser Licensing and Certification Board adopts amendments to §153.20, concerning Guidelines for Revocation, Suspension or Denial of Licensure or Certification, without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7644) and it will not be republished.

The adopted amendments to §153.20(f) adds language to provide an exception to the prohibition against conducting covert investigations so that the rule will conform with recent amendments made to the Texas Government Code and Penal Code under House Bill 716 that help address mortgage fraud.

No written comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Appraiser Licensing and Certification Act, Subchapter D, Board Powers and Duties (Texas Occupations Code, Chapter 1103), which provides the Board with authority to adopt rules relating to certification and licensure under §1103.151 and under §1103.154, Rules Relating to Professional Conduct.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706313
Troy Beaulieu
Attorney
Texas Appraiser Licensing and Certification Board
Effective date: December 31, 2007
Proposal publication date: October 26, 2007
For further information, please call: (512) 465-3959

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 533. PRACTICE AND PROCEDURE

22 TAC §§533.1 - 533.8, 533.20, 533.30 - 533.37, 533.40

The Texas Real Estate Commission (TREC) adopts new rules to Chapter 533, concerning Practice and Procedure, as follows: §533.1, concerning definitions of terms found in the chapter; §533.2, concerning the purpose and scope of the chapter; §533.3, concerning filing and notice procedures in a contested case; §533.4, concerning failure to answer, failure to attend a hearing, and default; §533.5, concerning the adjudicative hearing record; §533.6, concerning filing of exceptions and replies; §533.7, concerning proposals for decision; §533.8, concerning final order, motions for rehearing, and emergency orders; §533.20, concerning informal proceedings; §533.30, concerning alternative dispute resolution (ADR); §533.31, concerning referral of contested matters for ADR procedures; §533.32, concerning appointment of a mediator; §533.33, concerning qualifications of mediators; §533.34, concerning commencement of ADR; §533.35, concerning stipulations; §533.36, concerning agreement; §533.37, concerning confidentiality; and §533.40, concerning negotiated rulemaking. The new rules are adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7644) and will not be republished.

The TREC received no comments during the notice and comment period regarding adoption of the rules.

The reasoned justification for the adoption of the new rules is the implementation of legislation enacted during the 80th Legislative

Session which transferred the functions of the TREC administrative law judge to the State Office of Administrative Hearings and which provided for a negotiated rulemaking process. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to the Texas Occupations Code, Chapters 1101, 1102, and 1303.

The new rules are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapters 1101 and 1102 and §1303.051(a), which authorizes TREC to adopt and enforce rules necessary to administer Chapter 1303.

The statutes affected by this adoption are Texas Occupations Code, Chapters 1101, 1102, and 1303. No other statute, code, or article is affected by the adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706257
Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
Effective date: December 30, 2007
Proposal publication date: October 26, 2007
For further information, please call: (512) 465-3900

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22 TAC §§533.31 - 533.39

The Texas Real Estate Commission (TREC) adopts the repeal of provisions of Chapter 533, concerning Practice and Procedure, specifically §§533.31 - 533.39. New rules are being simultaneously adopted to replace the repealed rules. The repeal is adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7649) and will not be republished.

The commission received no comments during the notice and comment period regarding adoption of the repeal.

The reasoned justification for the adoption of the repeal is that the existing rules conflict with the new rules adopted to implement legislation enacted during the 80th Legislative Session which transferred the functions of the TREC administrative law judge to the State Office of Administrative Hearings. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to the Texas Occupations Code, Chapters 1101, 1102, and 1303.

The repeals are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapters 1101 and 1102 and §1303.051(a), which authorizes TREC to adopt and enforce rules necessary to administer Chapter 1303.

The statutes affected by this adoption are Texas Occupations Code, Chapters 1101, 1102, and 1303. No other statute, code, or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER D. THE COMMISSION

22 TAC §535.42

The Texas Real Estate Commission (TREC) adopts an amendment to §535.42, concerning Jurisdiction and Authority, which deletes a reference to an employee of TREC conducting contested case hearings. The amendment is adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7650) and will not be republished.

The commission received no comments during the notice and comment period regarding adoption of the amendment.

The reasoned justification for the adoption of the amendment is the implementation of legislation enacted during the 80th Legislative Session which transferred the functions of the TREC administrative law judge to the State Office of Administrative Hearings. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapters 1101, 1102, and 1303.

The amendment is adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapters 1101 and 1102, and §1303.051(a), which authorizes TREC to adopt and enforce rules necessary to administer Chapter 1303.

The statutes affected by this adoption are Texas Occupations Code, Chapters 1101, 1102, and 1303. No other statute, code, or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
Effective date: December 30, 2007
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For further information, please call: (512) 465-3900

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SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

22 TAC §535.51

The Texas Real Estate Commission (TREC) adopts amendments to §535.51, concerning General Requirements, and permanently adopts by reference six revised forms to reflect late renewal penalties for applicants for salesperson and broker licenses and an increased application fee for salesperson applicants. The amendment also provides that an applicant for a real estate salesperson or broker license must provide fingerprints to the Department of Public Safety within six months of the date of the application for a license or the application will be considered void and no longer subject to further evaluation. The amendment is adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7650), but with changes to five of the proposed forms.

The three applications for a salesperson's license, Trec Forms SL-11, SLR-9, and BSL-6 were corrected to remove typographical errors in the fee amounts. The Application for Late Renewal of Real Estate Broker License by a Corporation, TREC Form BLRC-5, and Application for Late Renewal of a Real Estate Broker License by a Limited Liability Company, TREC Form BLR-LLC-4, were corrected where they referenced the late renewal of a license expired after September 1, 2007 that had been expired for more than 90 days but less that six years. The term six years was an error and was changed to one year on each form.

The commission received no comments during the notice and comment period regarding adoption of the amendments.

The reasoned justification for the adoption of the amendments is the implementation of legislation enacted during the 80th Legislative Session which created the fingerprint requirement and affected the referenced late renewal penalties and also to reflect an increased application fee for salesperson applicants. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapters 1101 and 1102.

The amendment is adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1101.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code, or article is affected by the adoption.

§535.51. General Requirements.

(a) A person who wishes to be licensed by the commission must file an application for the license on the form adopted by the commission for that purpose. Prior to filing the application, the applicant must pay the required fee for evaluation of the education completed by the person and must obtain a written response from the commission showing the applicant meets current education requirements for the license.

(b) If the commission develops a system whereby a person may electronically file an application for a license, a person who has previously satisfied applicable education requirements and obtained an evaluation from the commission also may apply for a license by accessing the commission's Internet web site, entering the required information on the application form and paying the appropriate fee in accordance with the instructions provided at the site by the commission. If the person is an individual, the person must provide the commission with the person's signature prior to issuance of a license certificate. The person may provide the signature prior to the submission of an electronic application.

(c) The commission shall return applications to applicants when it has been determined that the application fails to comply with one of the following requirements.

(1) The applicant is not 18 years of age.

(2) The applicant does not meet any applicable residency requirement.

(3) An incorrect filing fee or no filing fee is received.

(4) The application is submitted in pencil.

(5) The applicant is not a citizen of the United States or a lawfully admitted alien.

(6) The applicant has not obtained, within one year from the date the application is filed, an evaluation from the commission showing the applicant meets education requirements or experience requirements have not been satisfied.

(d) An application is considered void and is subject to no further evaluation or processing when one of the following events occurs:

(1) the applicant fails to satisfy an examination requirement within six months from the date the application is filed;

(2) the applicant, having satisfied any examination requirement, fails to submit a required fee within sixty (60) days after the commission makes written request for payment;

(3) the applicant, having satisfied any examination requirement, fails to provide information or documentation within sixty (60) days after the commission makes written request for correct or additional information or documentation;

(4) the applicant fails to provide fingerprints to the Department of Public Safety within six months from the date the application is filed.

(e) The commission adopts by reference the following forms approved by the commission which are published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188:

(1) Application for a Real Estate Broker License, TREC Form BL-8;

(2) Application for a Real Estate Broker License by a Corporation, TREC Form BLC-5;

(3) Effective September 1, 2007, Application for Late Renewal of A Real Estate Broker License, TREC Form BLR-8;

(4) Effective September 1, 2007, Application for Late Renewal of Real Estate Broker License by a Corporation, TREC Form BLRC-5;

(5) Effective November 1, 2007, Application for Real Estate Salesperson License, TREC Form SL-11;

(6) Effective September 1, 2007, Application for Late Renewal of Real Estate Salesperson License, TREC Form SLR-9;

(7) Application for Moral Character Determination, TREC Form MCD-5;

(8) Application for Real Estate Broker License by a Limited Liability Company, TREC Form BLLLC-5;

(9) Effective November 1, 2007, Application of Currently Licensed Real Estate Broker for Salesperson License, TREC Form BSL-6; and

(10) Effective September 1, 2007, Application for Late Renewal of a Real Estate Broker License by a Limited Liability Company, TREC Form BLRLLC-4.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §§535.61 - 535.65

The Texas Real Estate Commission (TREC) adopts amendments to §535.61, concerning Examinations; §535.62, concerning Acceptable Courses of Study; §535.63, concerning Education and Experience Requirements for a License; §535.64, concerning Accreditation of Schools and Approval of Courses and Instructors; and §535.65, concerning Changes in Ownership or Operation of Schools, Presentation of Courses, Advertising, and Records. The amendments are adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7651) and will not be republished.

The adopted amendments to §535.61 and §535.63 clarify that new Texas Occupations Code, §1101.451(f), regarding late renewals does not apply to education and experience waivers authorized by rule under Texas Occupations Code, §1101.362.

The adopted amendments to §535.64 and §535.65 change references concerning the education provider bond from $10,000 to $20,000 and adopt by reference a revised bond form reflecting an increased amount required by law.

The adopted amendment to §535.62 provides that all TREC core courses that are offered by an alternative delivery method must be certified by a distance learning certification center that is acceptable by TREC.

The TREC received no comments during the notice and comment period regarding adoption of the amendments.

The reasoned justification for the adoption of the amendments is the implementation of legislation enacted during the 80th Legislative Session which affected education requirements and operation of educational programs. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1101.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1101.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code, or article is affected by the adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.71, §535.72

The Texas Real Estate Commission (TREC) adopts amendments to §535.71, concerning Mandatory Continuing Education: Approval of Providers, Courses, and Instructors and adopting by reference one revised form, and to §535.72, concerning Mandatory Continuing Education: Presentation of Courses, Advertising and Records. The amendment to §535.71 is adopted with changes to the proposal as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7653) and will be republished. Section 535.71(d)(7) was changed to update the form number referenced in that paragraph. Section 535.72 is adopted without changes and will not be republished.

The adopted amendments provide the procedure by which education providers must ensure that online Mandatory Continuing Education courses may not be completed in less than 24 hours.

The TREC received no comments during the notice and comment period regarding adoption of the amendments.

The reasoned justification for the adoption of the amendments is the implementation of legislation enacted during the 80th Legislative Session which created a new requirement that online Mandatory Continuing Education courses may not be completed in less than 24 hours. Senate Bill 914, which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1101.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1101.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code, or article is affected by the adopted amendments.

§535.71. Mandatory Continuing Education: Approval of Providers, Courses and Instructors.

(a) The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Real Estate License Act, Texas Occupations Code, Chapter 1101.

(2) Applicant--A person seeking approval to be a provider or instructor of a course for which mandatory continuing education credit is given.

(3) Hour--Fifty minutes of actual session time.

(4) Certified legal course instructor--An instructor approved by the Texas Real Estate Commission and certified to teach the required legal update course or the required ethics course.

(5) Commission--The Texas Real Estate Commission.

(6) Day--A calendar day.

(7) Distance learning course--A correspondence course, alternative delivery method course or course offered through video presentation.

(8) Elective credits--The nine hours of non-legal mandatory continuing education required by §1101.455 of the Act.

(9) Instructor--A person approved by the Texas Real Estate Commission to teach mandatory continuing education courses.

(10) MCE--Mandatory Continuing Education.

(11) Person--An individual, partnership, or a corporation, foreign or domestic.

(12) Proctor--A person who monitors a final examination for a course offered by a provider under the guidelines contained in this section. A proctor may be a course instructor, the provider, an employee of a college or university testing center, a librarian, or other person approved by the commission.

(13) Provider--A person approved by the Texas Real Estate Commission to offer courses for which mandatory continuing education credit is given.

(14) Required legal ethics course--A required course created for and approved by the Texas Real Estate Commission to satisfy three of the six legal hours of mandatory continuing education required by §1101.455 of the Act.

(15) Required legal update course--A required course created for and approved by the Texas Real Estate Commission to satisfy three of the six legal hours of mandatory continuing education required by §1101.455 of the Act.

(16) Required legal course or legal credits--The required legal update or legal ethics courses or credits earned for attending such courses.

(17) Student--An individual taking an MCE course for credit.

(b) Mandatory Continuing Education Requirements. On or after January 1, 2005 and except as authorized by §535.92 of this chapter, for the next and all subsequent renewals of a license on active status that is not subject to the annual education requirements of §1101.454 of the Act, the license holder must attend during the term of the current license, two Commission-developed legal courses consisting of a three-hour required legal update course and a three-hour required legal ethics course to satisfy the six legal hours of mandatory continuing education required by §1101.455 of the Act. The remaining nine hours required by §1101.455 of the Act may consist of elective credit courses registered with the commission under this section.

(c) Application. A person who wishes to offer courses accepted by the commission for MCE credit shall apply to the commission for approval to be an MCE provider and shall register each MCE course using application forms prepared by the commission. The commission may refuse to accept any application which is not complete or which is not accompanied by the appropriate filing fee. Each prospective provider shall submit a provider application and at least one principal information form.

(d) Forms. The commission adopts by reference the following forms published and available from the commission, P.O. Box 12188, Austin, Texas 78711-2188:

(1) MCE Form 1A-2, MCE Provider Application;

(2) MCE Form 1B-2, MCE Provider Application Supplement;

(3) MCE Form 2-3, MCE Principal Information Form;

(4) MCE Form 3A-3, MCE Course Application;

(5) MCE Form 3B-3, MCE Course Application Supplement;

(6) MCE Form 8-4, MCE Course Completion Roster;

(7) MCE Form 9-8, Alternative Instructional Methods Reporting Form;

(8) MCE Form 10-2, MCE Credit Request for an Out of State Course;

(9) MCE Form 11-4, MCE Instructor Credit Request;

(10) MCE Form 12-2, Individual MCE Elective Credit Request for State Bar Course;

(11) MCE Form 14-1, Individual MCE Partial Credit Request Form

(12) MCE Form 15-0, Individual MCE Elective Credit Request for Professional Designation Course; and

(13) MCE Form 16-0, MCE Instructor Application.

(e) Provider application. To be approved as an MCE provider, a person must satisfy the commission as to the person's ability to administer with honesty, trustworthiness and integrity a course of continuing education in MCE subjects registered with the commission. If the person proposes to employ independent contractors to conduct or to administer the courses, any independent contractor named in the application must meet this standard as if the independent contractor were the applicant; however, the applicant is responsible for responding to communications from the commission relating to the application.

(f) Additional information related to application. The commission may request that an applicant provide additional information, and the commission may terminate an application without further notice if the applicant fails to provide the additional information within 60 days of the mailing of a request by the commission.

(g) Fees. The commission shall establish fees in accordance with the provisions of the Act, §1101.152, at such times as the commission deems appropriate. Fees are not refundable and must be submitted in the form of a check or money order, or, in the case of state agencies, colleges or universities, in a form of payment acceptable to the commission.

(h) Approval of applicants. The commission may authorize the manager or director of the education division of the commission, or a designate, to determine whether applications for MCE providers or instructors should be approved or certified. The commission may disapprove an application for failure to satisfy the commission as to the applicant's honesty, trustworthiness or integrity, or for any reason which would be a ground to suspend or revoke a real estate license. If an application is disapproved, the commission shall provide written notice to the applicant detailing the basis of the decision.

(i) Appeal. An applicant may appeal a disapproval by filing with the commission a written request for a hearing within 10 days after the receipt of the notice of disapproval. Following the hearing, the commission may sustain or withdraw the disapproval or establish conditions for the approval of a provider, course or instructor. Proceedings involving applications shall be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001. Venue for any hearing conducted under this section shall be in Travis County.

(j) Power of attorney. If a provider does not maintain a fixed office in this state for the duration of the provider's approval to offer courses, the provider shall designate a resident of this state as attorney-in-fact to accept service of process and act as custodian of any records in Texas which the provider is required to maintain by these sections. A power-of-attorney designating the resident must be filed with the commission in a form acceptable to the commission.

(k) Subsequent application for provider approval or course registration. Unless withdrawn earlier for cause as provided by these sections, a provider's authority to offer courses for which MCE credit is given expires two years from the date the provider is approved by the commission. Authority to offer any MCE courses ends with the expiration of the provider's approval, and the provider must pay current fees and reapply for approval as a provider in order to offer MCE courses again. An elective credit course registered with the commission may be offered by the provider for a period of two years after the course is registered or until the provider's authority to act as a provider finally expires or is withdrawn for cause, whichever first occurs. If a course was originally registered by another provider, the registration period is measured from the date of registration for the original provider. A provider may apply for approval to be a provider for another two years no sooner than six months prior to the expiration of existing provider approval.

(l) Approval of instructor. A person who wishes to be an instructor of any MCE course shall apply to the commission for approval using an application form approved by the commission. To be approved as an instructor of any MCE course, an applicant must satisfy the commission as to the applicant's honesty, trustworthiness and integrity. Subsections (f) - (i) of this section apply to an applicant for approval of an instructor.

(m) Term of instructor approval. If the commission determines that the applicant meets the standards for instructor approval, the commission shall approve the application and provide a written notice of the approval to the applicant. Unless surrendered or revoked for cause, the approval will be valid for a period of five years.

(n) Subsequent application for instructor approval. No more than six months prior to the expiration of the current approval, an instructor may apply for approval for another five year period.

(o) Required legal update and ethics courses. The commission shall approve bi-annually a legal update course and a legal ethics course which shall be conducted through providers by instructors certified by the commission under this subchapter. The subject matter and course materials for the courses shall be created for and approved by the commission. The courses expire on December 31 of each odd-numbered year and shall be replaced with new courses approved by the commission. A provider may not offer a new course until an instructor of the course obtains recertification by attending a new instructor training program. Providers must acquire the commission-developed course materials and utilize such materials to conduct the required legal courses. The required legal courses must be conducted as prescribed by the rules in this subchapter and the course materials developed for the commission.

(p) Modification of the required legal courses. Providers and instructors may modify a required legal course only to provide additional information on the same or similar topics covered in the course or to create distance learning courses that are substantially similar to the live courses developed for the commission. To the extent that a required legal course is modified or integrated into a longer course for which additional elective credit is requested, the commission shall grant elective and legal credit for the combined course.

(q) Instructor certification. Only instructors certified by the commission may teach the required legal courses or develop distance learning courses for the presentation of required legal courses. An instructor must obtain prior commission approval under subsection (m) of this section prior to attending an instructor training program. The commission shall issue a written certification to an instructor to teach the applicable required legal course(s) upon the instructor's satisfactory completion of a training program to teach the required legal course(s) that is acceptable to the commission. An instructor may obtain certification to teach either one or both required legal courses. A certified legal course instructor may teach the required legal courses for any approved provider after the instructor has attended an instructor training program. A certified legal course instructor may not independently conduct a required legal course unless the instructor has also obtained approval as a provider. An instructor must obtain written certification from the commission prior to teaching the required legal courses and prior to representing to any provider or other party that he or she is certified or may be certified as a legal course instructor. An instructor's certification to teach a required legal course expires on December 31 of every odd-numbered year. An instructor may obtain recertification by attending a new instructor training program.

(r) Elective credit courses. To be approved to offer a course for MCE elective credit, the provider must demonstrate that the course subject matter is appropriate for a continuing education course for real estate licensees and that the information provided in the course will be current and accurate by submitting a brief statement that describes the objective of the course and explains how the subject matter is related to activities for which a real estate license is required, including but not limited to relevant issues in the real estate market or topics which increase or support the licensee's development of skill and competence.

(s) Elective course application. A provider applicant must submit an MCE Form 3A-3, MCE Course Application and receive written acknowledgment from the commission prior to offering an MCE elective course. Prior to advertising or offering a course offered by another provider, the subsequent provider must submit an MCE Form 3B-3, Course Application Supplement and receive written acknowledgment from the commission.

(t) Legal update and legal ethics course application. A provider must submit an MCE form 3B-3, Course Application Supplement and receive written acknowledgment from the commission prior to offering a required legal update or required legal ethics course.

(u) Core courses for elective credit. Courses approved by the commission for core real estate course credit provided in the Act, §1101.356 and §1101.358, may be accepted for satisfying MCE elective credit course requirements provided the student files a course completion certificate with the commission.

(v) Acceptable combined courses. An elective credit course offered by a provider to satisfy all or part of the nine hours of other than legal topics required by the Act, §1101.455, may be offered with the required legal update course or required legal ethics course.

(w) Required legal courses for real estate related courses. MCE legal update and legal ethics courses may be accepted by the

commission as real estate related courses for satisfying the education requirements of §1101.356 and §1101.358, of the Act.

(x) Correspondence courses for elective credit. An MCE provider may register an MCE elective course by correspondence with the commission if the course is subject to the following conditions:

(1) the course must be offered by a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, which offers correspondence courses, whether credit or noncredit, in other disciplines;

(2) the content of the course must satisfy the requirements of the Act, §1101.455, and these sections; and

(3) the course does not include a request for required legal course credit.

(y) Alternative delivery method courses for elective credit. An MCE provider may register an MCE elective course by alternative delivery method with the commission if the course is subject to the following conditions:

(1) The content of the course must satisfy the requirements of the Act, §1101.455, and these sections;

(2) the course does not include a request for required legal course credit; and

(3) every provider offering a registered course under this subsection shall:

(A) ensure that a qualified person is available to answer students' questions or provide assistance as necessary;

(B) provide that procedures are in place to ensure that the student who completes the work is the student who is enrolled in the course; and

(C) certify students as successfully completing the course only if the student:

(i) has completed all instructional modules; and

(ii) has attended any hours of live instruction and/or testing required for a given course.

(z) Correspondence courses for required legal credit. The commission may approve a provider to offer an MCE required legal ethics course by correspondence subject to the following conditions:

(1) the course must be offered by a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, which offers correspondence courses, whether credit or noncredit, in other disciplines;

(2) the content of the course must satisfy the requirements of the Act, §1101.455 and these sections, and must be substantially similar to the legal courses disseminated and updated by the Commission;

(3) students receiving MCE credit for the course must pass either:

(A) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(B) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks MCE credit; and

(4) written course work required of students must be graded by an approved instructor or the provider's coordinator or director, who is available to answer students' questions or provide assistance as necessary, using answer keys approved by the instructor or provider.

(aa) Each required legal course offered by correspondence must contain the following:

(1) course description;

(2) learning objectives;

(3) evaluation techniques;

(4) lessons;

(5) learning activities;

(6) final examination;

(7) source materials disseminated by the Commission including all updates; and

(8) instructor grading guidelines, including acceptable answers for lessons, assessments and examinations.

(bb) Alternative delivery method courses for required legal credit. The commission may accept required legal courses offered by alternative delivery method subject to the following conditions.

(1) The content of the course must satisfy the requirements of the Act, §1101.455 and these sections, and must be substantially similar to the legal courses disseminated and updated by the Commission.

(2) Every course accepted under this subsection shall teach to mastery. Teaching to mastery means that the course must, at a minimum:

(A) divide the material into major units of instruction that follows the outline of the applicable required legal course for delivery on a computer or other approved interactive audio or audiovisual programs;

(B) specify the learning objectives for each unit of instruction;

(C) specify an objective, quantitative criterion for mastery used for each learning objective;

(D) implement a structured learning method by which each student is able to attain each learning objective;

(E) provide a means of diagnostic assessment of each student's performance on an ongoing basis during each unit of instruction, measuring what each student has learned and not learned at regular intervals throughout each unit of instruction;

(F) provide a means of tailoring the instruction to the needs of each student as identified in subparagraph (D) of this paragraph. The process of tailoring the instruction shall ensure that each student receives adequate remediation for specific deficiencies identified by the diagnostic assessment;

(G) continue the appropriate remediation on an individualized basis until the student demonstrates achievement of mastery of each unit; and

(H) require that the student demonstrate mastery of all material covered by the learning objectives for the module before the module is completed.

(3) The commission must approve the method by which each of the above elements of mastery in paragraph (2)(A) - (H) of this subsection is accomplished.

(4) The rationale for the education processes implemented in the course must be based on sound instructional strategies which have been systematically designed and proven effective through educational research and development. The basis and rationale for any proposed instructional approach must be specified in the application for approval. Programs which consist primarily of text material will not be approved.

(5) An approved instructor or the provider's coordinator/director shall grade the written course work.

(6) Every provider offering an approved course under this subsection shall:

(A) ensure that a qualified person is available to answer students' questions or provide assistance as necessary;

(B) satisfy the commission that procedures are in place to ensure that the student who completes the work is the student who is enrolled in the course;

(C) certify students as successfully completing the course only if the student;

(i) has completed all instructional modules required to demonstrate mastery of the material;

(ii) has attended any hours of live instruction and/or testing required for a given course; and

(iii) has passed either:

(I) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(II) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks MCE credit; and

(D) provide the students with the same materials given to students who attend the same course by live instruction.

(cc) Supervised Video Instruction for elective course credit. A provider may register a course under subsection (s) of this section to be taught by supervised video instruction if:

(1) the provider complies with §535.72 of this chapter when offering and advertising the course and when completing rosters and retaining records;

(2) a proctor is present during the time the video is shown; and

(3) the provider discloses in any advertisement for the course that the instruction will be by supervised video instruction.

(dd) Supervised Video Instruction for required legal course credit. A provider may register a course under subsection (o) of this section to be taught by supervised video instruction if the provider:

(1) complies with subsection (cc)(1) - (3) of this section;

(2) ensures that a certified instructor is available to answer students' questions or provide assistance as necessary; and

(3) ensures that students receiving MCE credit for the course passed a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider.

(ee) An applicant must submit an MCE Form 3B-3, MCE Course Application Supplement to seek approval to offer an MCE distance learning required legal course and receive written acknowledgment from the commission prior to offering the course. Distance learning legal courses may be offered on or after July 1, 2005.

(ff) For a distance learning course, an online course will not be considered complete until credit is awarded by the provider. The provider shall award the student credit for the course no earlier than 24 hours after the student starts the course and after the student completes the course requirements for credit. The provider shall report the awarding of credit to the commission either by filing a completed MCE Form 9-8, Alternative Instructional Methods Reporting Form, signed by the student, or submitting the information contained in MCE Form 9-8 by electronic means acceptable to the commission.

(gg) A provider may use as guest speakers persons who have not been approved as instructors, provided that no more than a total of 50% of the course is taught by the unapproved persons for a registered MCE elective credit course. The commission-registered instructor must remain in the classroom during the guest speaker's presentation.

(hh) A provider may use guest speakers who have not been approved as instructors to conduct a registered MCE elective credit course if:

(1) the provider is an accredited college or university or a professional trade association as defined by §535.62(b) of this chapter; and

(2) the course is supervised and coordinated by a commission-approved instructor who is responsible for verifying the attendance of all who request MCE credit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

SUBCHAPTER I. LICENSES

22 TAC §§535.91, 535.92, 535.94

The Texas Real Estate Commission (TREC) adopts amendments to §535.91, concerning Renewal Notices; §535.92,

concerning Renewal: Time for Filing; Satisfaction of Mandatory Continuing Education Requirements; and §535.94, concerning Hearing on Application Disapproval; Probationary License. The amendments are adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7654) and will not be republished.

The TREC received no comments during the notice and comment period regarding adoption of the amendments.

The reasoned justification for the adoption of the amendments is the implementation of legislation enacted during the 80th Legislative Session which created a new provision that permits a 3-hour legislative exemption for Mandatory Continuing Education and which transferred the functions of the TREC administrative law judge to the State Office of Administrative Hearings. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1101.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1101.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code, or article is affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

22 TAC §535.191

The Texas Real Estate Commission (TREC) adopts new Subchapter Q, concerning Administrative Penalties, including new §535.191, concerning Schedule of Administrative Penalties. The new rule is adopted without changes to the proposal as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7655) and will not be republished.

The TREC received no comments during the notice and comment period regarding adoption of the new rule.

The reasoned justification for the adoption of the new rule is the implementation of legislation enacted during the 80th Legislative Session which requires TREC to adopt a schedule of administrative penalties for violations of law in order to ensure that the amount of penalty imposed is appropriate to the violation. Senate Bill 914, which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1101.

The new rule is adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1101.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code, or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §§535.206, 535.208, 535.210 - 535.212, 535.215, 535.216, 535.224

The Texas Real Estate Commission (TREC) adopts amendments to §535.206, concerning the Texas Real Estate Inspector Committee; §535.208, concerning Application for a License; §535.210, concerning Fees; §535.212, concerning Education and Experience for an Inspector License; §535.215, concerning Inactive Inspector Status; §535.216, concerning Renewal of License or Registration; and §535.224, concerning Practice and Procedure; and new §535.211, concerning Professional Liability Insurance. Sections 535.212 and 535.215 are adopted with changes to the proposal as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7656) and will be republished. Sections 535.206, 535.208, 535.210, 535.211, 535.216, and 535.224 are adopted without change and will not be republished.

Section 535.212(b) is changed to require that a person who chooses to obtain alternate experience requirements by working with a professional inspector must work with a professional inspector who is approved to be a sponsor under Texas Occupations Code, §1102.113. Section 535.212(b)(1) is changed to replace the word "or" with "and" in the first line to track the statutory requirements in §1102.111, Texas Occupations Code. Section 535.215(a)(4) is changed to delete a redundant "or."

The adopted amendments to §535.206 set the composition of the Texas Real Estate Inspector Committee and detail the qualifications and terms for each member.

The adopted amendments to §535.208 require all applicants for inspector licenses to provide proof that the applicant maintains professional liability insurance or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102 of the Texas Occupations Code and adopt by reference Certificate of Insurance, Form REI 8-0 to provide the requisite proof of insurance.

The adopted amendments to §535.210 establish the fee or an educational evaluation and delete the fee provisions for filing and renewing a professional inspector business license, as the business license requirement was repealed by House Bill 1530, enacted during the 80th Legislative Session.

The adoption of new §535.211 provides for inspector applicants to show proof of professional liability insurance or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102, Texas Occupations Code.

The adopted amendments to §535.212 require both education and experience in lieu of the experience required under the traditional three-tier application process in order to reflect new requirements under §1102.111, Texas Occupations Code. The amendments require an applicant under the alternate application process for a professional inspector license to provide proof of completion of 200 additional hours of education and either proof of completion of 120 hours of an experience training module, 120 hours of experience working with a licensed professional inspector who is approved to be a sponsor under Texas Occupations Code, §1102.113, or evidence of 5 years of experience in a field directly related to home inspecting.

Under the rule, there are three ways for applicants who are other than actively practicing licensed or registered architects, professional engineers, or engineers-in-training to gain the required experience. The "education experience module" alternative will provide for experience to be obtained under conditions where the hands-on experience is systematic in its coverage under closely supervised field instruction by an approved education provider. The "inspection experience" alternative will assure that the aspiring licensee gets actual home inspecting experience with a licensed professional inspector for a stated period. Lastly, the experience alternative assures that the applicant has experience in a field directly related to home inspecting. An applicant will be able to choose which method of alternate experience is best suited to an applicant's background and training.

The adopted amendments to §535.212 require applicants under the alternate application process for a real estate inspector license to provide proof of completion of 30 additional hours of education and proof of either completion of 60 hours of an experience training module, 60 hours of experience working with a licensed professional inspector who is approved to be a sponsor under Texas Occupations Code, §1102.113, or evidence of 3 years of experience in a field directly related to home inspecting.

If the applicant is an actively practicing licensed or registered architect, professional engineer, or engineer-in-training, the applicant meets the professional inspector education and experience requirement by actively practicing for 3 years and meets the real estate inspector education and experience requirement by actively practicing for 1 year.

If the applicant was enrolled in an education program with a significant experience component prior to September 1, 2007, the applicant meets the experience requirement in §1102.111(a), Texas Occupations Code. Not more than two persons may accompany a licensed professional inspector on inspections to meet the alternate experience component described in the amendments to §535.212.

All applicants under the alternate education and experience licensing method would be required to take the threshold education courses for each licensed type and to pass the relevant licensing examination.

The adopted amendments to §535.215 provide that a license will revert to inactive status if a licensee is unable to maintain professional liability insurance coverage or any other insurance that provides coverage for violation of Subchapter G of Chapter 1102, Texas Occupations Code.

The adopted amendments to §535.216 provide for home inspector renewal applicants to show proof of professional liability insurance or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102, Texas Occupations Code.

The adopted amendments to §535.224 delete provisions that authorized the Texas Real Estate Inspector Committee to hear disciplinary cases as such cases must, under new laws, be heard by the State Office of Administrative Hearings. The amendments also provide that failure to maintain proof of professional liability insurance or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102, Texas Occupations Code, is an additional cause for disciplinary action.

The commission received three comments during the notice and comment period regarding adoption of the amendments and the new rule, two from the Texas Real Estate Inspector Committee (the Committee) and one from a licensed inspector.

Comment: The Committee, by unanimous vote in public meeting, recommended that TREC not enforce the requirement that applicants and license holders provide proof of professional liability insurance coverage or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102, Texas Occupations Code.

Response: The Commission respectfully disagrees with the Committee as the Commission has no discretion to choose whether to enforce the requirements of Texas Occupations Code, §1102.114 which requires applicants for a home inspector license to provide proof that the applicant maintains liability insurance to protect the public against a violation of Subchapter G of Chapter 1102 of the Texas Occupations Code.

Comment: The Committee voted to recommend a change to the "fast track" experience component to require that the 120 hours of hands on experience with a professional inspector be with a professional inspector who is qualified to be a sponsor by having reached the 200 inspection mark and having been approved by TREC.

Response: The Commission agrees with the comment and has changed the rule accordingly.

Comment: The licensed inspector recommended that those entering the inspection business have 448 core educational hours and 120 hours of hands on and simulated experience, which he indicated was the position of the Texas Association of Real Estate Inspectors.

Response: The Commission respectfully disagrees with the commenter as it believes that 328 core education hours and 120 hours of hands on or simulated experience is sufficient to meet the education and experience requirements under §1102.111, Texas Occupations Code.

The reasoned justification for the adoption of the amendments is the implementation of legislation enacted during the 80th Legislative Session. Senate Bill 914 and House Bill 1530, each of which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1102.

The amendments and the new rule are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1102.

The statutes affected by this adoption are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code, or article is affected by the adopted rules.

§535.212. Education and Experience for an Inspector License.

(a) Education requirements.

(1) To be accepted for inspector licensing, a course must meet each of the following requirements.

(A) The course was devoted to a subject listed in Texas Occupations Code, Section 1102.001(5) or this section; provided, however, no more than 30 cumulative classroom hours in course credit may be accepted by the commission for inspection-related business, legal, report writing or ethics courses.

(B) The student was present in the classroom for the hours of credit granted by the course provider, or completed makeup in accordance with the requirements of the provider, or by applicable commission rule.

(C) Successful completion of a final examination or other form of final evaluation was a requirement for receiving credit from the provider.

(D) The daily course presentation did not exceed ten hours.

(E) The course was offered by one of the following providers:

(i) a school accredited by the commission;

(ii) a school accredited by an inspector regulatory agency of another state;

(iii) a college or university accredited by a regional accrediting association, such as the Commission on Colleges of the Southern Association of Colleges and Schools, or its equivalent, or by a recognized national or international accrediting body;

(iv) a unit of federal, state or local government;

(v) a nationally recognized building, electrical, plumbing, mechanical or fire code organization;

(vi) a professional trade association; or

(vii) an entity whose courses are approved and regulated by an agency of this state.

(2) The term "code organization" means a non-profit organization whose members develop and advocate scientifically based codes and standards relating to one or more of the systems found in an improvement to real estate. The term "professional trade association" means a nonprofit, cooperative, and voluntarily joined association of business or professional competitors that is designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting the common interest of its members.

(3) Except as provided to the contrary by this section, the review and acceptance of correspondence courses or courses offered by alternative delivery systems such as computers will be conducted in the manner prescribed by §535.62 of this title (relating to Acceptable Courses of Study). Correspondence courses are acceptable only if offered by an accredited college or university.

(4) Providers may obtain prior approval of a classroom course by submitting the following items to the commission:

(A) a course description, including the number of hours of credit to be awarded;

(B) a timed course outline;

(C) a copy of any textbook, course outline, syllabus or other written course material provided to students;

(D) a cross reference to the course material which demonstrates in a manner that is satisfactory to the commission where the required subject matter is covered in the course; and

(E) a copy of the written final examination which measures a student's mastery of the course.

(5) The following subjects shall be considered core real estate inspection courses for purposes of additional education requirements under subsection (b)(1)(B) of this section.

(A) Foundations, which shall include the following topics:

(i) site analysis/location;

(ii) grading;

(iii) foundations;

(iv) flat work;

(v) material;

(vi) foundation walls;

(vii) foundation drainage;

(viii) foundation waterproofing and damp proofing;

(ix) columns; and

(x) under floor space.

(B) Roof Systems, which shall include the following topics:

(i) review - rafters, roof joist, ceiling joist, collar ties, knee walls, purling, trusses, wood I joist, roof sheathing, steel framing

(ii) roof water control;

(iii) skylights;

(iv) flashing;

(v) ventilation/non-ventilation;

(vi) attic access;

(vii) re-roofing;

(viii) slopes -step roof/low slope/near flat;

(ix) materials -asphalt, fiberglass, wood shake, wood shingle, slate, clay tile, concrete tile, fiber cement (asbestos cement, mineral cement), metal, roll, build up, modified bitumen, synthetic rubber (EPDM), plastic (PVC); and

(x) valleys.

(C) Framing, which shall include the following topics:

(i) flashing;

(ii) wood frame - stick/balloon;

(iii) roof structure - rafters/trusses;

(iv) floor structure;

(v) porches/decks/steps/landings/balconies;

(vi) doors;

(vii) ceilings;

(viii) interior walls;

(ix) stairways;

(x) guardrails/handrails/balusters;

(xi) fireplace/chimney;

(xii) sills/columns/beams/joist/sub-flooring;

(xiii) wall systems/structure -headers;

(xiv) rammed earth;

(xv) straw bale;

(xvi) ICF;

(xvii) panelized;

(xviii) masonry;

(xix) wood I joist;

(xx) roof sheathing;

(xxi) wood wall;

(xxii) steel wall;

(xxiii) wood structural panel; and

(xxiv) conventional concrete.

(D) Electrical Systems, which shall include the following topics:

(i) general requirements, equipment location and clearances;

(ii) electrical definitions;

(iii) services;

(iv) branch circuit and feeder requirements;

(v) wiring methods;

(vi) power and lights distribution;

(vii) devices and light fixtures; and

(viii) swimming pool.

(E) HVAC Systems which shall include the following topics:

(i) heating;

(ii) ventilation;

(iii) air conditioning; and

(iv) evaporative coolers.

(F) Plumbing, which shall include the following topics:

(i) water supply systems;

(ii) fixtures;

(iii) drains;

(iv) vents;

(v) water heaters (gas and electric);

(vi) gas lines; and

(vii) hydro-therapy equipment.

(G) Building Enclosure, which shall include the following topics:

(i) review of foundation and roofing relation;

(ii) review of flashing;

(iii) cladding;

(iv) windows/glazing;

(v) weather barriers;

(vi) vapor barriers;

(vii) insulation;

(viii) energy codes; and

(ix) ingress/egress.

(H) Appliances, which shall include the following topics:

(i) dishwasher;

(ii) food waste disposer;

(iii) kitchen exhaust hood;

(iv) range, cooktop, and ovens (electric and gas);

(v) microwave cooking equipment;

(vi) trash compactor;

(vii) bathroom exhaust fan and heater;

(viii) whole house vacuum systems;

(ix) garage door operator;

(x) doorbell and chimes; and

(xi) dryer vents.

(I) Standards of Practice/Legal/Ethics, which shall include the following topics:

(i) review of general principals;

(ii) inspection guidelines for structural systems;

(iii) inspection guidelines for mechanical systems;

(iv) inspection guidelines for electrical systems;

(v) inspection guidelines for optional systems;

(vi) ethics; and

(vii) legal

(J) Standard Report Form/Report Writing, which shall include the following topics:

(i) required use of report form REI 7A-0;

(ii) allowed reproductions;

(iii) allowed changes;

(iv) exceptions from use of the form;

(v) review of typical comments for each heading in the report; and

(vi) review of generally accepted technical writing techniques.

(K) Other Approved Courses as they relate to real estate inspections, which shall include the following topics:

(i) Environmental Protection Agency;

(ii) Consumer Product Safety Commission; and

(iii) general business practices.

(6) A course approved to satisfy the additional education hours required by subsection (b)(1)(B) of this section in lieu of the number of real estate inspections required by Chapter 1102, Texas Occupations Code, and in lieu of the requirement that the applicant has previously been licensed for a specified time as an apprentice inspector or a real estate inspector must meet each of the following requirements.

(A) The course must cover one subject only.

(B) The course must include all the topics as described for each subject under subsection (a)(5) of this section.

(C) The total hours of credit to be awarded for the course must be equal to the hours required for each subject under subsection (b)(1)(B) of this section.

(D) A classroom course may include up to 10% of classroom time on site for appropriate field work relevant to the course topic. Such field work may not be included as part of correspondence or alternative delivery courses.

(7) A course that combines more than one subject into a composite course may be approved by the commission to satisfy core course education requirements under Texas Occupations Code §§1102.108 and 1102.109; however, composite courses will not satisfy the additional education requirements to obtain a professional inspector license under Texas Occupations Code §1102.111 and subsection (b)(1)(B) of the section.

(8) A course approved under subsection (a)(5) of this section may not be used more than once by an applicant to satisfy education course requirements under Texas Occupations Code §§1102.108 and 1102.109, and additional education course requirements under Texas Occupations Code §1102.111.

(9) An applicant must not have completed more than one course with substantially the same course content within a two year period.

(b) Experience and additional education requirements.

(1) An applicant may substitute the following experience and additional education in lieu of the number of real estate inspections required by Chapter 1102, Texas Occupations Code, (Chapter 1102) and in lieu of the requirement that the applicant has previously been licensed for a specified time as an apprentice inspector or a real estate inspector:

(A) To meet the additional education and experience requirements in connection with an application for a license as a real estate inspector:

(i) Actively practicing licensed or registered architects, professional engineers, or engineer-in-trainings meet some of the education requirements by taking 8 hours in Standards of Practice/Legal/Ethics and 8 hours in Standard Report Form/Report Writing from an approved education provider. They meet the other education requirements by virtue of meeting the education requirements for obtaining and maintaining their licenses as architects or engineers. They meet the experience requirement through two years of active practice under their respective license or registration.

(ii) Persons other than those described in clause (i) of this subparagraph may meet the education requirement by completing 30 additional education hours acceptable to the commission. The additional 30 education hours must include foundation systems, roof systems, framing, electrical systems, HVAC systems, plumbing, building enclosures, and appliances.

(iii) Persons other those described in clause (i) of this subparagraph may meet the experience requirement by either completing an approved experience training module of at least 60 hours from an approved education provider; accompanying a licensed professional inspector who is approved to be a sponsor under Texas Occupations Code §1102.113 for at least 60 hours on actual inspections and related work and having that licensed professional inspector certify such attendance; or by having at least three years of personal experience in a field directly related to home inspecting, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical and electrical systems found in improvements to real property. Documentation of experience must include two reference letters from persons other than the applicant who have personal knowledge of the applicant's occupation and work.

(B) To meet the additional education and experience requirements in connection with an application for a license as a professional inspector:

(i) Actively practicing licensed or registered architects, professional engineers, or engineer-in-trainings meet some of the education requirements by taking 8 hours in Standards of Practice/Legal/Ethics and 8 hours in Standard Report Form/Report Writing from an approved education provider. They meet the other education requirements by virtue of meeting the education requirements for obtaining and maintaining their licenses as architects or engineers. They meet the experience requirement through three years of active practice under their respective license or registration.

(ii) Persons other than those described in clause (i) of this subparagraph may meet the education requirement by completing 200 additional education hours acceptable to the commission. The additional 200 education hours must include 30 hours in Foundation Systems, 25 hours in Roof Systems, 30 hours in Framing, 25 hours in Electrical Systems, 25 hours in HVAC Systems, 25 hours in plumbing, 12 hours in Building Enclosure, 6 hours in Appliances, 8 hours in Standards of Practice/Legal/Ethics, 8 hours in Standard Report Form/Report Writing, and 6 hours of other approved courses.

(iii) Persons other those described in clause (i) of this subparagraph may meet the experience requirement by either completing an approved experience training module of at least 120 hours from an approved education provider; accompanying a licensed professional inspector who is approved to be a sponsor under Texas Occupations Code §1102.113 for at least 120 hours on actual inspections and related work and having that licensed professional inspector certify such attendance; or by having at least five years of personal experience in a field directly related to home inspecting, including but not limited to installing, servicing, repairing or maintaining the structural, mechanical and electrical systems found in improvements to real property. Documentation of experience must be in verified form and from persons other than the applicant who have personal knowledge of the applicant's occupation and work.

(iv) Not more than two persons may accompany a licensed professional inspector who is qualified to be a sponsor under Texas Occupations Code §1102.113 on actual inspections to meet the experience requirement of §1102.111(a).

(C) Persons other than those described in subparagraphs (A)(i) and (B)(i) who, prior to September 1, 2007, were

also enrolled in and attending an educational program that met the requirements of Texas Occupations Code, §1102.111 in effect prior to September 1, 2007, may meet the experience requirement by successfully completing that program if it includes in its curriculum applied teaching that includes an experience segment in a lab or simulator environment, actual on-site inspections, or a similar setting that provides direct experience with the inspection of those systems covered in the course and the use of the basic inspection-related tools. The education provider offering the program must confirm to commission staff, in writing, that the program includes such an experience segment. This subparagraph (C) of this paragraph expires automatically and may not be relied upon for any license application made after January 1, 2008.

(2) For the purpose of measuring the number of inspections required to receive a license or to sponsor apprentice inspectors or real estate inspectors, the commission will consider an improvement to real property to be any unit which is capable of being separately rented, leased or sold. Subject to the following restrictions, an inspection of an improvement to real property which includes the structural and equipment/systems of the unit will constitute a single inspection.

(A) Half credit will be given for an inspection limited to structural components only or to equipment/systems only.

(B) No more than 80% of the inspections for which experience credit is given may be limited to structural components only or to equipment/systems components only.

(C) A report which covers two or more improvements will be considered a single inspection.

(D) Real estate inspectors and professional inspectors may not receive experience credit for an inspection performed by an apprentice under their supervision.

(E) The commission may not give experience credit to the same applicant or professional inspector for more than three complete or six partial inspections per day. No more than three applicants may receive credit for the inspection of the same unit within a 30 day period, and no more than three apprentice inspectors may receive credit for an inspection of the same unit on the same day.

(F) For the purpose of satisfying any requirement that a license be held for a period of time prior to an applicant's being eligible for a license as a real estate inspector or professional inspector, the commission may not give credit for periods in which a license was on inactive status. An applicant for a real estate inspector license must have been licensed on active status for a total of at least three months within the 12 month period prior to the filing of the application. An applicant for a professional inspector license must have been licensed on active status for a total of at least 12 months within the 24 month period prior to the filing of the application.

§535.215. Inactive Inspector Status.

(a) For the purposes of this section, an "inactive" inspector is a licensed professional inspector, real estate inspector, or apprentice inspector who is not authorized by law to engage in the business of performing real estate inspections as defined by Texas Occupations Code, Chapter 1102 (Chapter 1102), and who has been placed on inactive status by the commission for any of the following reasons:

(1) the written request of the inspector to be placed on inactive status;

(2) termination of sponsorship by a professional inspector;

(3) the death of the inspector's sponsoring professional inspector;

(4) the failure of the licensee to satisfy continuing education requirements for an active license;

(5) the expiration, suspension, or revocation of the license of the inspector's sponsoring professional inspector;

(6) the failure of the licensee to provide to the commission proof of professional liability insurance or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102; or

(7) the expiration or non-renewal of the inspector's professional liability insurance or any other insurance that provides coverage for violations of Subchapter G of Chapter 1102.

(b) To be placed on inactive status by request, an inspector must do the following:

(1) apply to the commission on a form approved by the commission for that purpose, or by a letter containing the inspector's name, license number and current mailing address;

(2) if the inspector is a licensed professional inspector, confirm in writing that the inspector has given any real estate inspectors or apprentice real estate inspectors sponsored by the inspector written notice that the inspector will no longer be their sponsor at least 30 days prior to filing the request for inactive status; and

(3) return the inspector's license certificate to the commission.

(c) A professional inspector who has been placed on inactive status may apply to the commission for return to active status on a form approved by the commission. A professional inspector may apply on a form approved by the commission to sponsor an apprentice inspector or real estate inspector who has been on inactive status. The commission may not return an inspector to active status or issue a license certificate to the inspector unless the inspector has completed within one year prior to the filing the request for return to active status any applicable continuing education courses required for renewal of the type of license held by the inspector or satisfied the continuing education requirements in order to obtain the current license.

(d) An inspector who applies to renew a license and pays the applicable fee but who fails to complete any continuing education required by the Act as a condition of license renewal shall be placed on inactive status by the commission. The inspector must comply with the requirements of this section in order to return to active status.

(e) If a professional inspector terminates the sponsorship of an apprentice real estate inspector or real estate inspector, the license of the apprentice inspector or real estate inspector becomes inactive. The apprentice real estate inspector or real estate inspector must be sponsored by a professional inspector in order to return to active status.

(f) Inactive inspectors may not perform inspections. Performance of inspections while on inactive status is grounds for disciplinary action against the inactive licensee. An professional inspector who has been placed on inactive status may not return to practice or sponsor apprentices or inspectors until the professional inspector has completed applicable continuing education requirements and, if the inspector was placed on inactive status at the inspector's own request, applied to the commission for return to active status and paid the applicable fee for the filing. An apprentice inspector or real estate inspector who has been placed on inactive status may return to practice if the inspector has completed applicable continuing education requirements, and the inspector's sponsoring professional inspector has requested that the apprentice inspector or real estate inspector be returned to active status under the professional inspector's sponsorship in accordance with the provisions of this section. It is a violation of this section and grounds for disciplinary action against a professional inspector for

the professional inspector to permit an inactive apprentice inspector or an inactive real estate inspector to perform inspections in association with, or on behalf of, the professional inspector.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2007.

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Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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22 TAC §535.209

The Texas Real Estate Commission (TREC) adopts the repeal of §535.209, concerning Professional Inspector Corporations and Limited Liability Companies. The repeal is adopted without changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7661) and will not be republished.

The TREC received no comments during the notice and comment period regarding adoption of the repeal.

The reasoned justification for the adoption of the repeal is the implementation of legislation enacted during the 80th Legislative Session which repealed the licensure requirements for corporations and limited liability companies that engage in home inspection services for a fee. House Bill 1530, which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1102.

The repeal is adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1102.

The statute affected by this adoption is Texas Occupations Code, Chapter 1102. No other statute, code, or article is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.30, 537.31, 537.41, 537.47, 537.50

The Texas Real Estate Commission (TREC) adopts amendments to §537.30, concerning Standard Contract Form TREC No. 23-7, New Home Contract (Incomplete Construction); §537.31, concerning Standard Contract Form TREC No. 24-7, New Home Contract (Completed Construction); §537.41, concerning Standard Contract Form TREC No. 34-3, Addendum for Property Located Seaward of the Gulf Intracoastal Waterway; §537.47, concerning Standard Contract Form TREC No. 40-3, Third Party Financing Condition Addendum; and new §537.50, concerning Standard Contract Form TREC No. 43-0, Addendum Containing Required Notices Under §5.016, §420.001 and §420.002, Texas Property Code. The sections adopt by reference five revised contract forms for use by Texas real estate licensees. Section 537.50 is adopted with changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7662) and will be republished. Section 537.50 was corrected to include a reference to §5.016, Texas Property Code, which was omitted in the proposed rule. The form adopted by reference in §537.47, TREC No. 40-3, Third Party Financing Condition Addendum, was changed based on a recommendation from the Broker Lawyer Committee after review of the comments. Sections 537.30, 537.31, and 537.41 are adopted without changes and will not be republished.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contracts for the sale of real property. These forms are drafted by the Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The adopted amendment to §537.30 adopts by reference Standard Contract Form TREC No. 23-7, New Home Contract (Incomplete Construction). The disclosure on Page 8 of the contract required by §27.007(a), Texas Property Code, is revised because the disclosure was amended by House Bill 3147, 80th Legislature, R.S. (2007).

The adopted amendment to §537.31 adopts by reference Standard Contract Form TREC No. 24-7, New Home Contract (Completed Construction). The revisions adopted are the same as those adopted for Form TREC No. 23-7.

The adopted amendment to §537.41 adopts by reference Standard Contract Form TREC No. 34-3, Addendum for Property Located Seaward of the Gulf Intracoastal Waterway. The addendum was revised to reflect changes that were made to the disclosure under House Bill 2819, 80th Legislature, R.S. (2007).

The adopted amendment to §537.47 adopts by reference Standard Contract Form TREC No. 40-3, Third Party Financing Addendum. On page 2 of the addendum, a reference to having HUD form 92564-CN signed and dated by the buyer was removed as the form no longer has a signature line. Based on written comments and a recommendation from the Broker Lawyer Committee, the title and reference to "Texas Veterans Housing Assistance Program Loan" was changed in paragraph B to "Texas Veterans Loan" because other types of loans are offered by the Texas Veterans Land Board.

The adoption of new §537.50 adopts by reference Standard Contract Form TREC No. 43-0, Addendum Containing Required

Notices Under §5.016, §420.001 and §420.002, Texas Property Code. The new addendum contains disclosures required by House Bill 1038, 80th Legislature, R.S. (2007) in cases where the seller may be subject to or exempt from requirements of Title 16, Texas Property Code, regarding registration with the Texas Residential Construction Commission.

The TREC received two comments during the notice and comment period regarding adoption of the amendments or the new rule.

Comment: The Commenters suggested amending paragraph B of Form TREC No. 40-3, Third Party Financing Addendum to indicate that the buyer may have more than one kind of loan from the Texas Veteran's Land Board.

Response: The Commission agrees with the commenters and has revised the form accordingly.

The reasoned justification for the adoption of the amendments and the new rule and the forms adopted by reference is the revision of standard contract forms required for use by real estate licensees to reflect recent changes in law.

The amendments and new section are adopted under Texas Occupations Code, §1101.151, which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1101.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code, or article is affected by the adopted rules.

§537.47. Standard Contract Form TREC No. 40-3.

The Texas Real Estate Commission adopts by reference standard contract form, TREC No. 40-3 approved by the Texas Real Estate Commission in 2008 for use as an addendum to be added to promulgated forms of contracts when there is a condition for third party financing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.50. Standard Contract Form TREC No. 43-0.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 43-0 approved by the Texas Real Estate Commission in 2008 for use as an addendum to be added to promulgated forms of contracts when there is a condition requiring notices under §5.016, §420.001 and §420.002, Texas Property Code. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 539. PROVISIONS OF THE RESIDENTIAL SERVICE COMPANY ACT

SUBCHAPTER O. ADMINISTRATIVE PENALTIES

22 TAC §539.140

The Texas Real Estate Commission (TREC) adopts new Subchapter O, concerning Administrative Penalties, including new §539.140, concerning Schedule of Administrative Penalties. The new rule is adopted with changes to the proposed text as published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7663). Section 539.140(c)(7) was corrected to show the referenced statute as §1303.352(a)(6), not §1303.352(6), and §539.140(d) was corrected to remove a reference to subsection (a).

The TREC received no comments during the notice and comment period regarding adoption of the new rule.

The reasoned justification for the adoption of the rules is the implementation of legislation enacted during the 80th Legislative Session which requires TREC to adopt a schedule of administrative penalties for violations of law in order to ensure that the amount of penalty imposed is appropriate to the violation. Senate Bill 914, which became effective September 1, 2007, included revisions to Texas Occupations Code, Chapter 1303.

The rule is adopted under Texas Occupations Code, §1303.051(a), which authorizes TREC to adopt and to enforce rules necessary to administer Chapter 1303.

The statute affected by this adoption is Texas Occupations Code, Chapter 1303. No other statute, code, or article is affected by the adopted rules.

§539.140. Schedule of Administrative Penalties.

(a) The administrative penalties set forth in this section take into consideration all of the criteria listed in §1303.355(c) of the Texas Occupations Code.

(b) An administrative penalty range of $100 - $1,500 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) 22 TAC §539.137(b);

(2) §1303.202(a);

(3) §1303.202(b);

(4) §1303.052; and

(5) §1303.352(a)(1).

(c) An administrative penalty range of $500 - $5,000 per violation per day may be assessed for the following violations of the Texas Occupations and Administrative Codes:

(1) §1303.101;

(2) §1303.151;

(3) 22 TAC §539.81;

(4) §1303.153;

(5) §1303.352(a)(2);

(6) §1303.352(a)(3); and

(7) §1303.352(a)(6).

(d) The commission may assess an additional administrative penalty of up to two times that assessed under subsections (b) and (c) of this section if the residential service company has a history of previous violations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 26. TEXAS BOARD OF LICENSURE FOR PROFESSIONAL MEDICAL PHYSICISTS

CHAPTER 601. MEDICAL PHYSICISTS

22 TAC §§601.1 - 601.22

The Texas Board of Licensure for Professional Medical Physicists (board), with the approval of the Executive Commissioner of the Health and Human Services Commission (commission) adopts amendments to §§601.1 - 601.22, concerning the licensing and regulation of medical physicists without changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4722) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

These rules relate to the licensure and regulation of medical physicists. The amendments constitute the state agency review required by Government Code, §2001.039. Sections 601.1 - 601.22 have been reviewed and the board has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. The rules also incorporate the applicable provisions of House Bill 2680, 79th Legislature, Regular Session (2005), relating to reduced fees for retired health professionals, including medical physicists, engaged in the provision of voluntary charity care. Amendments are necessary to update and clarify the rules.

SECTION-BY-SECTION SUMMARY

Amendments to §601.1 reflect new language to include retired medical physicists performing voluntary charity care. Amendments to §601.2 reflect the name change from the Texas Department of Health to the Department of State Health Services; and include new language relating to the definition of radiological procedure based on the current rules for Texas Regulations for Control of Radiation. Amendments to §601.3 update language regarding the policy against discrimination. Amendments to §601.4 delete language related to obsolete requirements for a one-year license renewal term and add new language and the reduced fee for retired medical physicists performing voluntary charity care. Amendments to §601.5 correct a grammatical error. Amendments to §601.6 eliminate the requirement that a licensure application must be notarized.

Amendments to §601.7 revise the title of the rule and clarify language. Amendments to §601.8 revise the title of the rule and refine the educational qualifications for new applicants to correspond to current standards in the field. Amendments to §601.9 correct a typographical error. The amendment to §601.10 eliminates the requirement that copies of documents submitted in connection with a name change must be certified or notarized. Amendments to §601.11 delete obsolete language related to requirements for a one-year license renewal term, delete obsolete language relating to the term of initial issuance of a license, and delete references to renewal after a continuing education extension of 180 days. Amendments to §601.12 delete unnecessary language relating to the notice of application approval.

Amendments to §601.13 correct typographical errors. Amendments to §601.14 and §601.15 clarify and update language.

Amendments to §601.16 update language to reference Class A misdemeanors in compliance with the Occupations Code, Chapter 602; eliminate the requirement that a licensee's response must be notarized; and add references to emergency suspension of a license.

Amendments to §601.17 clarify language relating to return of a license. Amendments to §601.18 are added to include board name and mailing address. Amendments to §601.19 update language to reference noncompliance with child custody order. Amendments to §601.20 reflect the deletion of obsolete language related to requirements for a one-year license renewal term, clarify terms, delete obsolete language, delete language regarding a licensee filing a continuing education report with the board; and delete provisions relating to the 180 day extension for continuing education which is no longer necessary, given the two-year license term. Amendments to §601.21 update language for the role of a service engineer. Amendments to §601.22 update and clarify rule references and other terms.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed amendments during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §602.151, which authorizes the board to adopt rules necessary for the performance of the board's duties; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2007.

TRD-200706350
Philip Bourland
Chair
Texas Board of Licensure for Professional Medical Physicists
Effective date: January 2, 2008
Proposal publication date: August 3, 2007
For further information, please call: (512) 458-7111 x6972

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PART 27. BOARD OF TAX PROFESSIONAL EXAMINERS

CHAPTER 623. REGISTRATION AND CERTIFICATION

22 TAC §623.4

The Board of Tax Professional Examiners adopts an amendment to §623.4, concerning Persons Permitted to Register with grammatical changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6242).

This amendment is intended to ensure that there is a thorough review of the past behavior of certain persons who may reapply for registration by the Board after a period of "inactivity." The Board received no public written comments and no one appeared to testify at the public hearing held on November 28, 2007.

The amendment is adopted under the authority of Texas Civil Statutes, Occupations Code, Chapter 1151, Property Taxation Professional Certification Act, which provides the Board of Tax Professional Examiners with the authority to promulgate rules consistent with the statute.

§623.4. Persons Permitted to Register.

(a) No person shall be permitted to register who is not required to register. There shall be no registration categories involving associates, nonparticipating, etc. Registrants must be actively engaged in appraising, assessing/collecting, or collecting for an appraisal district or taxing unit in the state.

(b) If a registrant becomes inactive under subsection (a) of this section because the registrant in a criminal case pleads guilty, is convicted, or is given deferred adjudication of an offense or offenses that if pursued through the complaint procedure would have resulted in revocation, the board may upon complaint brought before it by the executive director, a board member, or a citizen of the state revoke the registrants license so that the registrant may not apply for registration for a period of three years as provided in §629.4(a) of this title (relating to Revocation of Registration). Such a revocation procedure shall be summary in nature with the registrant being given an opportunity to appear before a meeting of the full board with counsel.

(c) If it comes to the attention of a board member or the executive director that a registrant may have committed an act that could have resulted in disciplinary action by the board, but the registrant is inactive as a result of the operation of subsection (a) of this section, the board may proceed through its regular complaint and disciplinary procedures to determine whether an appropriate discipline should be recorded in the registrant's file at the board's office.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2007.

TRD-200706348
David Montoya
Executive Director
Board of Tax Professional Examiners
Effective date: January 2, 2008
Proposal publication date: September 14, 2007
For further information, please call: (512) 305-7300

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS
SUBCHAPTER B. ORGANIZATION

22 TAC §850.62

The Texas Board of Professional Geoscientists (TBPG or Board) adopts an amendment to §850.62 regarding the general powers and duties of the Board. It is adopted without changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4727).

The adopted amendment adds language to 22 TAC §850.62 which clarifies the guidelines regarding complaints submitted to the Board.

No comments were received regarding adoption of this amendment.

The amendment is adopted under the Texas Occupations Code, §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties. This amendment also corresponds to §1002.251 and §1002.351, which require those persons or entities practicing geoscience before the public to be licensed by TBPG.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706379
Vincent Houston
Acting Executive Director
Texas Board of Professional Geoscientists
Effective date: January 3, 2008
Proposal publication date: August 3, 2007
For further information, please call: (512) 936-4405

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CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

SUBCHAPTER A. LICENSING

22 TAC §851.28

The Texas Board of Professional Geoscientists (TBPG or Board) adopts an amendment to §851.28 regarding license renewal and reinstatement. It is adopted without changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4728).

The adopted amendment to 22 TAC §851.28(a) increases the minimum number of days the Board can mail a renewal notice to a license holder from 30 days to 60 days. This amendment more closely aligns TBPG rules to its enabling statute regarding notification of license expiration.

No comments were received regarding adoption of this amendment.

The amendment is adopted under the Texas Occupations Code, §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties. It also corresponds with §1002.301, regarding license renewal guidelines.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706377
Vincent Houston
Acting Executive Director
Texas Board of Professional Geoscientists
Effective date: January 3, 2008
Proposal publication date: August 3, 2007
For further information, please call: (512) 936-4405

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22 TAC §851.31

The Texas Board of Professional Geoscientists (TBPG or Board) adopts an amendment to §851.31 regarding temporary licenses. It is adopted without changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4729).

The adopted amendment clarifies language in 22 TAC §851.31 which establishes guidelines for temporary licenses. This amendment removes redundant language from the rule.

No comments were received regarding adoption of this amendment.

The amendment is adopted under the Texas Occupations Code, §1002.151, which authorizes the Board to adopt and enforce rules consistent with the Texas Geoscience Practice Act and necessary for the performance of its duties, and §1002.258, which allows the Board to issue temporary licenses.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706378
Vincent Houston
Acting Executive Director
Texas Board of Professional Geoscientists
Effective date: January 3, 2008
Proposal publication date: August 3, 2007
For further information, please call: (512) 936-4405

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER K. MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3. DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD AND NON-ROAD VEHICLES

30 TAC §114.622

The Texas Commission on Environmental Quality (commission) adopts an amendment to §114.622 *with changes* to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5324).

The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Senate Bill 12 (SB 12), 80th Legislature, 2007, amended Texas Health and Safety Code, Chapter 386, Texas Emissions Reduction Plan (TERP) Program. Most of the new provisions add to existing project categories and do not require amendment of the rules for implementation. The TERP Guidelines will be revised to include the additional grant criteria established by SB 12.

The adopted rulemaking amends §114.622 to implement the cost-effectiveness increase from $13,000 per ton of nitrogen oxides reduced to $15,000 per ton under Texas Health and Safety Code, §386.106(a), as required by SB 12. Senate Bill 12 also authorizes the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties.

In addition to the amendment adopted to implement SB 12, the rule will be amended to remove the option for grant recipients to permanently remove from the State of Texas the old equipment

or engines replaced under a grant project. With this amendment, grant recipients will be required to recycle or scrap the old equipment or engine, with one exception. Based on comments received, the rule amendment is changed to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

SECTION DISCUSSION

The adopted amendment would increase the cost-effectiveness of eligible projects and allow the commission to designate vehicle travel on highways and roadways to count towards the percentage of use requirement. The adopted amendment will also omit the option to move replaced equipment from the State of Texas. For proposed projects that include the replacement or repower of equipment, the old equipment or engine must be recycled or scrapped, with one exception. The executive director may allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

§114.622. Incentive Program Requirements.

The adopted amendment to §114.622(b) allows the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties. Section 114.622(b) currently establishes a usage commitment of 75 percent for vehicle miles traveled to occur in a nonattainment area or affected county.

The adopted amendment to §114.622(c) requires grant recipients to recycle or permanently scrap old equipment and engines. Section 114.622(c) currently includes an option for grant recipients to permanently remove from the state equipment or engines replaced under the program, in lieu of recycling or scrapping. Beginning with grants issued in fiscal year 2007, the commission has not allowed grant recipients to use the removal option and has required that the old equipment or engine to be recycled or scrapped. After evaluating the implementation of the replacement and repower grants for several years, staff found that it was difficult to ensure that old equipment and engines were actually removed from the state and, if removed, would not be returned to the state in the future. Staff determined that the best way to ensure that the reductions in emissions of nitrogen oxides are achieved is to not allow this option and to require that the old equipment and engines be recycled or scrapped, with one exception. Based on comments received, §114.622(c) is being adopted with a change from proposal to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

The adopted amendment to §114.622(d) increases the cost-effectiveness for projects from the current $13,000 per ton of nitrogen oxides emissions reduced to $15,000 per ton of nitrogen oxides emissions reduced.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to §2001.0025 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted amendment to Chapter 114 modifies the existing rules in accordance with SB 12, 80th Legislature, which amended Texas Health and Safety Code, Chapter 386. The adopted amendment is part of a voluntary incentive program with the goal of reducing diesel emissions and as such, the adopted rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, a regulatory impact analysis is not required because the adopted rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law, and the technical requirements are consistent with applicable federal standards. In addition, this rulemaking does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 12, 80th Legislature. The amendment implements a voluntary program and only affects motor vehicles and equipment which are not considered to be private real property. Therefore, promulgation and enforcement of this adopted rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning rules subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this action for consistency and determined the rulemaking for Chapter 114 does not impact any CMP goals or policies

because it adds criteria to a voluntary incentive grant program and does not govern air pollution emissions.

PUBLIC COMMENT

The public hearings for this rulemaking were held on: September 11, 2007, 11 a.m., Texas Commission on Environmental Quality, 12100 Park 35 Circle, Austin; September 11, 2007, 3:30 p.m., North Central Texas Council of Governments, 616 Six Flags Drive, Arlington; and September 11, 2007, 3:30 p.m., Houston-Galveston Area Council, 3555 Timmons Lane, Houston.

Emisstar LLC (Emisstar), City of Dallas (Dallas), United States Environmental Protection Agency Region 6 (EPA), Fort Worth Chamber of Commerce (FWC), North Central Texas Council of Governments (NCTCOG), and Port of Houston Authority (PHA) submitted oral and/or written comments in support of all or part of the rulemaking. BNSF, Emisstar, Genessee & Wyoming Inc.-Motive Power (G&W), Railpower Hybrid Technologies Corp. (Railpower), and Union Pacific Railway Company (UP) submitted oral and/or written comments expressing concerns and/or suggesting changes to part of the proposal. Dallas, FWC, Greater Dallas Chamber (GDC), NCTCOG, Neste Oil, PHA, UP and one individual submitted oral and/or written comments not directly related to the TERP rulemaking.

RESPONSE TO COMMENTS

Change to §114.622(b) regarding travel on designated highways and roadways.

NCTCOG, Emisstar, and EPA expressed support for the change. NCTCOG also urged the commission to use all flexibility allowed in applying this clause to determining the project cost-effectiveness.

The commission appreciates the support for the changes to the rule. Regarding the additional recommendation made by NCTCOG, Texas Health and Safety Code, §386.105(d), states that only the reductions in NO_x emissions that are achieved in the nonattainment areas and affected counties may be used to determine the cost-effectiveness of a project. Therefore, the commission would not be able to consider the reductions in NO_x emissions occurring on the designated highways and roadways outside of the nonattainment areas and affected counties when calculating the cost-effectiveness of a project.

UP commented that this change would support commission designation of certain railways to count toward the percentage of use requirement in locomotive replacement projects.

The commission does not agree with UP's interpretation of the rule change. The change only applies to vehicles traveling on designated highways and roadways, not rail lines.

Change to §114.622(c) to remove the option for equipment and engines replaced or repowered under the TERP program to be permanently removed from the State of Texas in lieu of being recycled or scrapped.

NCTCOG, Dallas, EPA, FWC, and PHA expressed support for the change to the rule.

The commission appreciates the support for the changes to the rule.

Emisstar, G&W, BNSF, Railpower, and UP did not support the change to the rule.

Emisstar stated that it has information that potential TERP participants have been unwilling to participate in TERP for the past few grant rounds because the commission began not accepting the transfer or sale of the old equipment and engines to out-of-state users. As an example, Emisstar stated that several stevedoring companies at Texas ports have elected to not participate in TERP because of this requirement. Emisstar referred to data indicating that in 2006, eleven stevedoring companies participated in TERP, but a year later when the commission began not accepting the transfer option, only six stevedoring companies participated in the program.

Emisstar further stated that the concerns about ensuring that the transfer occurs and that the equipment and engines are not returned to the state are addressed by the stipulation in the TERP contract that the equipment must remain out of the state. Emisstar suggested that the commission allow two options: 1) allow TERP participants the option of choosing whether to take a salvage value of $1,000 and scrap the engine or equipment; or 2) allow the transfer or sale of the engine or equipment out of state, with a requirement that the TERP participant is contractually liable for ensuring that the engine or equipment never returns to Texas.

G&W stated that it operates 47 individual railroads, performs rail switching services in 12 U.S. port facilities and provides rail switching services to dozens of industrial customers in 26 states, including Texas. G&W stated that it is unfortunate that it can not and will not participate in a program where it is forced to scrap an otherwise viable locomotive asset that could be redeployed to another region, state or rail operation. G&W further stated that this change will likely remove all incentive for railroad locomotive operators to participate in the TERP and that the program will not receive any more locomotive submittals if this change becomes effective.

BNSF stated that it understands that it has been difficult for TCEQ staff to ensure that old equipment and engines are removed from the state and would not be returned to the state. However, BNSF stated that the locomotives likely to be replaced under the program are not appropriate for use as cores to manufacture the new Gen Set locomotives that would be purchased to replace the old locomotive. BNSF indicated that the locomotives that would be replaced in Texas are often more reliable than the locomotives used in other BNSF system locations and that the value of those locomotives is often greater than the book value because of the limited market. BNSF stated that the rule change would greatly increase the cost of future locomotive replacements in Texas and will likely result in fewer grant applications from BNSF. BNSF referenced TERP grant data through January 2007 that indicated that locomotives have made up only 2 percent of the number of TERP projects but have resulted in 40 percent of the TERP NO_x emissions reductions.

BNSF suggested an alternative approach to the scrapping only requirement where the commission could require that the grant recipient install global positioning systems on the locomotives being replaced. The TCEQ staff could then observe the location of the old locomotives on a real time basis.

UP stated that the change to the rule will seriously hinder the ability of UP and other railroad companies operating in Texas to undertake new locomotive projects, result in the loss of already limited projects capable of capturing further available NO_x emissions reductions, and create a general disincentive for participation in the program.

UP also stated that switch engine replacement projects are well-suited for permanent removal from Texas and that verification is not difficult. UP explained that it has maintained ownership and control of the old locomotives and that it has ample opportunity to relocate old locomotives that have remaining useful life. UP stated that roughly half of the locomotives replaced under the program have been scrapped and their engines destroyed, with the rest of the locomotives being reassigned to other UP locations outside of Texas. UP references its locomotive management system as a reliable means of ensuring that the locomotives are not returned to the state and pointed to the success of the replacement projects that have been completed.

UP explained that as a result of the program's success, most of the oldest switch locomotives in UP's Texas fleet have been replaced and that locomotives available for future replacements have a longer remaining activity life and are of more value that the locomotive replaced in the past.

Railpower also stated its objection to this change to the rules. Railpower's comments reflected the same point of view as the statements made by the railroad companies, including concern that railroad companies would find it hard to participate in the TERP program in the future. Railpower also stated that the California Air Districts have acknowledged that the railroad companies have and will fulfill the requirements to control the locomotives replaced under the California Carl Moyer Program and will continue to allow the option of removing the locomotive from the state.

The commission understands the concern expressed regarding the effect this change will have on the participation in the TERP program by owners of non-road equipment and locomotives. As noted by Emisstar, the commission began not accepting the option to transfer or sell the old equipment and engines outside the state beginning with the fiscal year (FY) 2007 grant rounds. This change to the rule will make permanent the interim decision by the commission to not accept that option, with one exception. The rule amendment is changed to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

This change to the rule is based on a number of factors, including a detailed internal review of the program by the commission's audit staff and an evaluation of the risks associated with the grant award decisions. In addition, guidelines published in 2006 by the EPA, entitled *Diesel Retrofits: Quantifying and Using Their Benefits in SIPs and Conformity- Guidance for State and Local Air and Transportation Agencies* (EPA420-B-06-005, June 2006), state that in order to use emissions reductions from any replacements in a SIP or in a conformity determination the vehicle, engine, or equipment being replaced should be scraped or the replaced engine returned to the original manufacturer for remanufacturing to a cleaner standard. Under the provision proposed in the rule change, the commission would consider the remanufacture process as a form of scrapping the old engine.

The commission has very little control over the replaced equipment once it leaves the state. The commission is also limited in its ability to ensure that the old equipment or engines are actually removed from the state. This change is proposed to address the risks associated with the replacement grants as well as the direction in the EPA guidance to ensure that the old equipment and engines are permanently removed from the emissions inventory and that the emissions reductions are creditable to the SIP.

However, the commission agrees that railroad companies, in particular, may be able to adequately ensure that a locomotive that is removed from Texas is not returned to the state. Based on the comments received, the rule amendment is changed to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

Change to §114.622(d) increasing the maximum cost-effectiveness from $13,000 to $15,000 per ton of NO_x emissions reduced.

NCTCOG, Emisstar, Dallas, and EPA expressed support for the increase in the maximum cost-effectiveness limit.

The commission appreciates the support for the changes to the rule.

G&W expressed concern that the increase in the maximum cost-effectiveness in the rules would mean very little in the end. G&W expressed doubts that rail projects would be allowed to use the maximum $15,000 cost-effectiveness limit, since past legislation required that the commission always maintain locomotive and marine projects at a lower cost-effectiveness than other projects.

The commission agrees that past legislation requires that locomotive and marine vessel projects have a lower cost-effectiveness limit. Texas Health and Safety Code, §386.102(e)(1), requires the commission to establish cost-effectiveness limits for grants awarded under the program to an owner or operator of a locomotive or marine vessel that are lower than the cost-effectiveness limits applied to other emissions reduction projects. However, the commission does not agree that the rule change will mean little to rail projects. Because the limit on all projects is being raised, the commission will be able to set a higher limit on locomotive and marine projects as well. Decisions on the cost-effectiveness limits to use for each project category, subject to the maximum limit set by this rule change, will be made separate from this rulemaking and prior to the opening of each grant application period.

FWC and GDC also recommended that the commission set the limits for all project types at the maximum allowed of $15,000. GDC stated that increasing the previous limits of $5,000 for on-road and $10,000 for non-road sources would encourage greater participation in TERP by individuals in the North Texas area.

The commission appreciates the support of the TERP program by FWC and GDC and agrees that raising the cost-effectiveness limits for on-road and non-road projects would encourage greater participation in the TERP program. As explained in the response to the previous comment, a decision on the cost-effectiveness limits to set for each type of project, subject to the maximum limit set by this rule change, will be made by the commission separate from this rulemaking and prior to opening each grant application period. The comments by FWC and GDC will be considered when that decision is being made.

Other comments not directly related to this rulemaking.

NCTCOG and Dallas expressed support for the establishment of a diesel testing center as authorized under SB 12, 80th Texas Legislature.

The establishment of a diesel testing center is outside the scope of this rulemaking. The commission agrees that the establishment of a diesel testing center as authorized under SB 12 will

provide a valuable resource for the state to evaluate retrofit systems and advanced technologies to determine their effectiveness in reducing emissions of NO_x and other pollutants.

NCTCOG requested the commission's support and provision of allocation of grant funds to the area necessary to meet the Dallas-Fort Worth nonattainment area's air quality goals.

This comment is outside of the scope of this rulemaking. The commission agrees that the TERP program is an important tool in helping the Dallas-Fort Worth nonattainment area to meet its air quality goals. The commission will consider the needs of the area when determining how the funds will be allocated and used.

NCTCOG suggested that the commission consider expanding the requirements that the emissions reductions that can be attributed to retrofit technology be verified by the EPA and the California Air Resources Board to include technology verified under testing programs outside of the country. NCTCOG stated that other states have determined the need for and permitted technologies verified through similar processes in Europe and Asia to be included in their air quality programs.

This comment is outside of the scope of this rulemaking. The commission will seek additional information regarding the requirements of other states for accepting retrofit technologies for emissions reduction credit.

Neste Oil provided information regarding its technology to produce renewable diesel fuel from either vegetable oil or animal fats by adding hydrogen to the bio-feedstock to make renewable paraffinic hydrocarbons, also known as alkanes. Neste Oil stated that adding alkanes to diesel fuel tends to reduce NO_x. Neste Oil also stated that definitions are being written that could exclude this new technology and prevent the commission from harvesting the low-hanging NO_x reduction fruit. Neste Oil asked for any assistance that the commission can provide to maintain a level playing field so that this and other evolving technology can help the commission to achieve the goals of energy security, reducing green house gases, and lowering NO_x emissions.

This comment is outside of the scope of this rulemaking. The statement regarding definitions being written that might exclude the new technology appear to be in reference to the rules pertaining to Texas Low Emission Diesel (TxLED) requirements specified in Chapter 114, Subchapter H, Division 2. Those rules include standards for cetane and aromatic levels in diesel fuel sold in the eastern part of the state. The commission's TxLED program staff may be contacted for more information regarding how the TxLED requirements may possibly affect the sale and use of the fuel products that may become available from Neste Oil if approved by the EPA for use in the United States.

UP recommended that the commission develop "job assignment" criteria for awarding grants that can be directly assigned to specific jobs or tasks conducted by an applicant, rather than limiting grants to specific units or pieces of equipment. UP explained that when a locomotive is removed from service at a location for fueling, maintenance, or inspection, a similarly-sized locomotive must be assigned to the job. That replacement locomotive will have the same or similar characteristics. UP stated that the grant program's potential is not fully realized in situations where some of the locomotives on a job are ineligible for the grant program but have emission characteristics that are identical to eligible locomotives assigned to the same job.

This comment is outside of the scope of this rulemaking and appears to be aimed at the requirement that vehicles and equipment replaced under the program must have been owned and operated in Texas for the two years preceding the application submission. UP's recommendation would require a major change to the methodology for verifying that a reduction in NO_x emissions will occur as a result of the replacement project.

UP recommended that the commission simplify its process for awarding grants by contracting with grant recipients on a comprehensive "lump-sum" basis for a specified amount rather than by providing reimbursement on an expense-by-expense basis. UP stated that the reimbursement process is complicated and adds unnecessarily to the administrative costs incurred by both the TCEQ and the grant recipients.

This comment is outside of the scope of this rulemaking. Implementation of a lump-sum approach would require statutory changes.

One individual discussed a technology he was developing called the TriTrack electrified guideway. He stated that the commission has specifically listed diesel engines as the only thing that will be considered under the TERP program. He further stated that if the TERP program is only allowed to be applied to diesel engines it is seriously flawed, as diesel engines need to be obsolete soon rather than have the state buying more of them to continue to run for decades. He proposed that TERP money be used for engineering and development of the replacement for diesel engines, not buying more. He explained that if TERP money were diverted to a more intelligent approach that has a multiplication effect like research and development then the TERP can achieve its underlying goal of cleaner air at a price the taxpayers can afford that does not play favorites with those who are the very offenders.

This comment is outside of the scope of this rulemaking. The commission does not agree with the statements that the TERP program only considers diesel engines. Under Texas Health and Safety Code, §386.053(d), the commission is authorized to expand the program, through the criteria established in the TERP Guidelines, to include vehicles and equipment that use fuels other than diesel. Based on that authority, the project criteria established in the *Texas Emissions Reduction Plan Guidelines for Emissions Reduction Incentive Grants* (RG388- May 2004) allows funding for vehicles, equipment, and engines that use fuels other than diesel, including electric engines. To date, the TERP program has funded projects that include alternative fuel vehicles and equipment, electric equipment and engines, and electrification and alternative fuel infrastructure. The commission encourages projects that meet the grant criteria and can be shown to result in significant reductions in NO_x emissions, regardless of the type of fuel used.

Regarding the comments on the need for TERP money to be diverted to research and development, funding from the TERP revenue sources is available through the New Technology Research and Development (NTRD) Program established under Texas Health and Safety Code, Chapter 387. This program provides funding for research, development, testing and certification of new technologies that will result in reductions in emissions of NO_x and other air pollutants. The TCEQ's NTRD program staff may be contacted for more information about this program.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, which provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, which authorizes the commission to adopt any rules necessary to carry

out the powers and duties under the provisions of the Texas Water Code and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code, Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property: §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and Chapter 386, which establishes the TERP. Finally, the amendment is adopted as part of the implementation of SB 12, 80th Legislature, 2007.

The adopted amendment implements Texas Clean Air Act, §§382.002, 382.011, 382.012, and 382.017, Texas Health and Safety Code, Chapter 386, and SB 12, 80th Legislature, 2007.

§114.622. Incentive Program Requirements.

(a) Eligible projects include:

(1) purchase or lease of on-road and non-road diesels;

(2) emissions-reducing retrofit projects for on-road or non-road diesels;

(3) emissions-reducing repower projects for on-road or non-road diesels;

(4) purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels;

(5) development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower nitrogen oxides (NO_x) emissions;

(6) use of qualifying fuel;

(7) implementation of infrastructure projects;

(8) replacement of on-road and non-road diesels with newer on-road and non-road diesels; and

(9) other projects that have the potential to reduce anticipated NO_x emissions from diesel engines.

(b) For a proposed project as listed in subsection (a) of this section, other than a project involving a marine vessel or engine, not less than 75% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or scrapped provided, however, that the executive director may allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed a cost-effectiveness of $15,000 per ton of NO_x emissions reduced. The commission may set lower cost-effectiveness limits as needed to ensure the best use of available funds. The commission may also base project selection decisions on additional measures to evaluate the effectiveness of projects in reducing NO_x emissions in relation to the funds to be awarded.

(e) Projects funded with a grant from this program may not be used for credit under any state or federal emissions reduction credit averaging, banking, or trading program except as provided under Texas Health and Safety Code, §386.056.

(f) A proposed project as listed in subsection (a) of this section is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified project, regardless of the fact that the state implementation plan assumes that the change in equipment, vehicles, or operations will occur, if on the date the grant is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase of an on-road diesel or equipment required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

(g) A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO_x emissions to the level established in the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388) for that type of project compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(h) If a grant recipient fails to meet the terms of a project grant or the conditions of this division, the executive director can require that the grant recipient return some or all of the grant funding to the extent that emission reductions are not achieved or cannot be demonstrated.

(i) Criteria established in the guidelines, including revisions to the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388), apply to the Texas Emissions Reduction Plan program. Notwithstanding the provisions of this chapter, as authorized under Texas Health and Safety Code, §386.053(d), revisions to the guidelines may include, among other changes, adding additional pollutants; adding stationary engines or engines used in stationary applications; adding vehicles and equipment that use fuels other than diesel; or adjusting eligible program categories; as appropriate, to ensure that incentives established under this program achieve the maximum possible emission reductions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 17, 2007.

TRD-200706393
Robert Martinez
Director
Texas Commission on Environmental Quality
Effective date: January 6, 2008
Proposal publication date: August 24, 2007
For further information, please call: (512) 239-6087

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.16

The Texas Parks and Wildlife Commission adopts an amendment to §53.16, concerning Vessel, Motor, and Marine Licensing Fees, without changes to the proposed text as published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6993).

The amendment is necessary to implement the requirements of House Bill (HB) 12, enacted by the 80th Texas Legislature. Section 19A of HB Bill 12 amended Parks and Wildlife Code, Chapter 31, by adding new Subchapter G, which requires the commission to establish by rule the requirements and procedures for the issuance and renewal of a party boat operator license, as necessary to protect the public health and safety. Additionally, HB 12 requires the commission to by rule establish a reasonable fee for the issuance of a party boat operator license and a fee for the required annual water safety inspection of a party boat. Elsewhere in this issue of the *Texas Register* the department has published a notice of adoption of the new rules governing party boats and party boat operators.

The amendment will function by establishing a fee of $125 for an initial application for a party boat operator license, a renewal application fee of $50 for a party boat operator license, an inspection fee of $125 per party boat, and a $50 fee for a replacement party boat operator license.

The department received three comments opposing adoption of the proposed amendment. Each of the three commenters articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

One commenter opposed adoption and stated that user fees should be based on a percentage of the passengers, that all other user fees are simply prohibitive barriers to free enterprise, and that safety regulations should be enforced by local authority. The commenter also stated that insurance should be a responsibility, and not a liability. The department disagrees with the commenter and responds, respectively, that: 1) a system of assessing fees based on the volume of business would require reporting and verification requirements at a level that in addition to being burdensome would be expensive, necessitating higher fees; 2) the provisions of HB 12 require the department to impose fees for the issuance of a party boat operator's license and inspection of party boats, which the department has done in the least onerous method possible while still following the commission policy of establishing fees adequate to recover the cost of program administration; 3) although the provisions of HB 12 require the department to establish the party boat operator's license and the water safety inspection, the rules may be enforced by any marine safety enforcement officer employed by a municipality or other political subdivision; and 4) the provisions of HB 12 require the owner of a party boat to obtain liability insurance in an amount determined by the commission; this provision cannot be altered or eliminated by the commission. The amount of minimum liability insurance required by the rules was determined in part by consultation with the regulated community. The department has received no opposition to the adoption of the proposed rules from any party boat owners or operators. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the amount of minimum liability coverage required by the rules is insufficient for a party boat carrying 90 passengers to the snapper banks off Port Aransas and that the liability amounts should be tied to number of passengers, the length of vessel, it's horsepower, and other factors. The department disagrees with the comment and responds that the rules do not apply in saltwater and that the minimum amount of liability insurance was determined by surveying other states and the regulated community and is believed to be adequate. No changes were made as a result of the comment.

One commenter opposed adoption and stated that boat registration fees already in place are expensive to fixed and lower income residents. The department disagrees with the comment and responds the rules as adopted do not affect boat registration fees. No changes were made as a result of the comments.

The department received two comments supporting adoption of the proposed amendment.

The amendment is adopted under the provisions of House Bill 12, §19A, enacted by the 80th Texas Legislature, which added new Subchapter G to Parks and Wildlife Code, Chapter 31, requiring the commission to adopt and enforce rules necessary to implement that subchapter and to establish a fee for the annual water safety inspection of a party boat required by this subchapter; and Parks and Wildlife Code, §11.027, which authorizes the commission to rule may establish and provide by rule for the collection of a fee to cover costs associated with the review of an application for a permit required by the Parks and Wildlife Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2007.

TRD-200706332
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: January 1, 2008
Proposal publication date: October 5, 2007
For further information, please call: (512) 389-4775

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CHAPTER 55. LAW ENFORCEMENT

SUBCHAPTER H. PARTY BOATS

31 TAC §§55.401 - 55.406

The Texas Parks and Wildlife Commission adopts new §§55.401 - 55.406, concerning regulation of party boats, without changes to the proposed text as published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6995).

The new rules are necessary to implement the requirements of House Bill (HB) 12, enacted by the 80th Texas Legislature. Section 19A of HB Bill 12 amended Parks and Wildlife Code, Chapter 31, by adding new Subchapter G, which requires the commission to establish by rule the requirements and procedures for the issuance and renewal of a party boat operator license, as necessary to protect the public health and safety.

A "party boat" is defined in Parks and Wildlife Code, §31.171(2), as added by HB 12, as "a vessel: (A) operated by the owner of the vessel or an employee of the owner; and (B) rented or leased by the owner for a group recreational event for more than six passengers." The provisions of HB 12 require the department to regulate party boats on inland lakes and waterways. The bill requires party boats to be subject to annual inspection, requires the operator of a party boat to be licensed and complete a boat safety course, imposes limits on the number of passengers that are authorized to be present at one time on a party boat, and requires party boat operators to maintain a minimum amount of liability insurance. The bill provides rulemaking authority to the commission to implement the provisions of the subchapter, including fees, and requires the commission to adopt such rules by no later than January 1, 2008.

New §55.401, concerning Definitions, establishes the meanings for words and terms used in the subchapter, and is necessary to provide for the unambiguous interpretation of specialized terms for purposes of compliance and enforcement.

New §55.402, concerning Applicability and Exceptions, specifies the activities and vessels to which the subchapter does and does not apply and would exempt persons who possess a pilot's or captain's license issued by the United States Coast Guard (USCG), or who possess a similar license issued by another state, from having to acquire a Texas party boat operator's license. The new section is necessary to ensure that persons who operate a party boat are licensed and regulated as required by statute. The exceptions to the license requirement are necessary to prevent duplication of licensing effort for persons who already possess a license that is similar in effect and scope to the Texas party boat operator's license. The provision also creates an exception to the inspection requirement of §55.405(a) for boats carrying a valid and current certificate of inspection issued pursuant to federal law. The federal inspection is sufficient to establish that a vessel is seaworthy.

New §55.403, concerning License Required, stipulates the circumstances under which a person would be required to possess a party boat operator's license, and establishes a defense to prosecution. The new section is necessary to implement the provisions of HB 12, which define specific conditions that constitute the operation of a party boat. The new section includes a defense to prosecution because it is conceivable that there could be an instance in which a person who is licensed to operate a party boat might not be in physical possession of the license.

New §55.404, concerning Party Boat Operator License--General Provisions, prescribes the process for application for and renewal of a party boat operator license, the period of validity for a party boat operator license, duplicate licenses, and denial of license issuance. Elsewhere in this issue of the *Texas Register*, the department is adopting a rule amendment to establish an application fee for the operator license of $125 for initial two-year licensure and $50 per two-year period thereafter.

New §55.404(a) specifies that a person must apply for a party boat operator license by completing a form prescribed by the department and paying an application fee. Elsewhere in this issue of the *Texas Register*, the department is adopting a rule amendment to establish an application fee of $125 for initial two-year licensure and $50 per two-year period thereafter. The provision is necessary to provide for a uniform process that it is easy for the department to administer and for the applicant to understand and navigate. The new subsection also would require the applicant to pass a written water safety test as a condition of licensure, as required under the provisions of HB 12.

New §55.404(b) establishes a two-year period of validity for the party boat operator license. The two-year period of validity was chosen because a shorter period of validity would create administrative burdens for the department, inspection personnel, and law enforcement recordkeeping, while a longer period of validity would weaken the department's ability to ensure that party boat operators are in compliance with applicable law. The new provision is necessary because the legislature specifically charged the department with providing for public health and safety in the rules.

New §55.404(c) would prescribe the process for renewal of a party boat operator license. The new subsection would require that the holder of a party boat operator license submit a renewal application within 60 days of the expiration of the current license (accompanied by a fee of $50) and would require re-application for all persons who fail to do so. The new provision is necessary because the department considers that continuous licensure is convenient for both the department and the regulated community, but there must also be a deadline in order to ensure that all persons operating party boats are doing so under a current license.

New §55.404(d) sets forth the conditions under which a licensee is required to obtain or may obtain a duplicate party boat operator license, and provides for the payment of a $50 application fee for a replacement license. The new subsection requires a person to obtain a replacement license whenever the person changes their name or mailing address, which is necessary so that the personal information on a license is always accurate. The new subsection also provides for the replacement of damaged, lost, destroyed, or stolen licenses, which is necessary to provide a means for licensees to comply with license possession requirements.

New §55.404(e) specifies the conditions under which the department would refuse to issue a party boat operator license to an applicant. The new subsection stipulates that a person is ineligible to obtain a party boat operator license if that person has been, within five years of application for a license, finally convicted of a violation of Penal Code, Chapter 49, involving operation of a motorboat, or a violation of Parks and Wildlife Code, Chapter 31, involving reckless or negligent behavior or behavior that placed passengers in peril. Penal Code, Chapter 49, governs offenses involving intoxication and alcoholic beverages. Parks and Wildlife Code, Chapter 31, governs water safety. The department believes it is necessary to prevent licensure of persons with recent criminal convictions involving either the operation of a motorboat while intoxicated or in such a fashion as to be a danger to passengers. The new subsection also prevents any person from being issued a license if the person is prohibited from holding a similar license in another state. The new subsection is necessary because the legislature specifically charged the department with providing for public health and safety in the rules.

New §55.405, concerning Employer/Owner Responsibilities, prescribes the obligations of persons who own a party boat or employ persons to operate a party boat.

New §55.405(a) prohibits the operation of any party boat unless it has undergone and passed an annual safety inspection conducted or authorized by the department. The new subsection is necessary because the terms of HB 12 require that a party boat may not be operated unless it has passed an annual safety inspection conducted by the department or a person under contract with the department.

New §55.405(b) requires the owner of a party boat to obtain a minimum of $300,000 in liability insurance. The department obtained this value by surveying similar requirements in other states in order to determine a suitable level of insurability. The new subsection is necessary because the provisions of HB 12 require the owner of a party boat to obtain liability insurance in an amount established by the commission.

New §55.405(c) prohibits the owner of a party boat from knowingly allowing the operation of the party boat by any person prohibited from doing so by statute or regulation, and from training a person to operate a party boat unless the person is employed by the owner and has passed an approved boater safety course. The new subsection is necessary because the provisions of HB 12 specifically charge the department with providing for public health and safety in the rules. The department considers that is a danger to public health and safety for the owner of a party boat to allow the operation of the party boat by a person known to be prohibited by law from doing so. For the same reason, the department also considers that a party boat operator trainee should be an employee of the party boat owner and should have the same water safety training required of any other boat operator while being trained.

New §55.405(d) requires that a list of safety procedures be posted in a conspicuous location on a party boat vessel at all times that paying passengers are on board. The new subsection is necessary because the provisions of HB 12 require that each passenger on a party boat be provided with written and verbal safety information; the new subsection enumerates the items of greatest importance that passengers should be aware of while they are on board.

New §55.405(e) provides three methods for determining the maximum number of passengers that may be aboard a party boat. The new subsection is necessary because the provisions of HB 12 stipulate that a party boat may not carry more than the maximum number of passengers the boat may safely accommodate, as determined by the department on inspection. The department considers that the vessel capacity plate is one standard, but in the absence of the vessel capacity plate, there should be some method of determining the capacity of the vessel. Therefore, the department has decided to employ additional methods approved by the USCG.

New §55.406, concerning Violations and Penalties, recapitulates the provisions of Parks and Wildlife Code, §31.127, which prescribes the penalties for violations of Chapter 31 or regulations adopted under the authority of Chapter 31.

The new rules will function collectively to implement the requirements of HB 12, enacted by the 80th Texas Legislature. Section 19A of HB Bill 12 amended Parks and Wildlife Code, Chapter 31, by adding new Subchapter G, which requires the commission to establish by rule the requirements and procedures for the issuance and renewal of a party boat operator license, as necessary to protect the public health and safety.

The department received two comments opposing adoption of the proposed amendment. Both commenters articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the agency's response, are as follows.

One commenter opposed adoption and stated that the rules were "anti constitutional." The department disagrees with the comment and responds that the rules as adopted do not violate the federal or state constitutions. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should waive the inspection requirement and fee for a vessel that has been inspected by the Coast Guard or Coast Guard Auxiliary. The department disagrees with the comment and responds that the rules do not apply to vessels in saltwater, which are the only vessels required to be inspected by the Coast Guard. No changes were made as a result of the comment.

The department received three comments supporting adoption of the proposed rules.

The new rules are adopted under the provisions of House Bill 12, §19A, enacted by the 80th Texas Legislature, which added new Subchapter G to Parks and Wildlife Code, Chapter 31, requiring the commission to adopt and enforce rules necessary to implement that subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.581

The Comptroller of Public Accounts adopts new §3.581, concerning margin: taxable and nontaxable entities, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6271).

This section implements House Bill 3, 79th Legislature, Third Called Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines to determine the taxability of legal entities under Tax

Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) defines words and terms used in this section. Subsection (c) provides a detailed list of entities that are taxable. Subsection (d) provides a detailed list of entities that are not taxable. Subsection (e) clarifies the taxability of a single member limited liability company.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Texas Oil & Gas Association recommended that §3.581 clarify when the term "taxable entity" refers to a combined group and when it refers to an entity within the combined group. The comptroller agrees that clarification of the term "taxable entity" in reference to a combined group may eventually need to be addressed however, for now, the rule will continue to follow the statute until additional data is received indicating those areas that are unclear.

The State Bar of Texas, Section of Taxation (SBT) recommended that an Internal Revenue Code, §645 trust be included in the definition of an "estate of a natural person". The comptroller agreed and has amended subsection (b)(5) accordingly.

The Texas Society of Certified Public Accountants (TSCPA) recommended that subsection (b)(15), the definition of a "partnership", be amended to include the definition along with the cite. The comptroller declined to make this amendment as the citation alone is adequate.

The TSCPA recommended adding an explanation or examples to definitions in subsection (b)(17) - (20). The comptroller determined that explanations or examples are not necessary.

SBT recommended clarifying subsection (b)(23) to recognize that entities that are sole proprietorships for federal tax purposes and do not limit the liability of the owner are treated for revised franchise tax purposes as nontaxable sole proprietors. The comptroller agreed and has amended subsection (b)(23) accordingly.

The TSCPA recommended that subsection (c)(14) be clarified by including examples of "other legal entities". The comptroller declined as this provision is intended as a catch-all for other "legal entities" that might be created.

The Bingo Interest Group, Jetta Services, LLC, Veterans of Foreign Wars, and Texas Charity Advocates recommended that subsection (d)(5) concerning nontaxable entities be amended to include grantor trusts where all of the grantors or beneficiaries are charitable entities that are participants in a unit as defined by Occupations Code, Chapter 2001, Subchapter I-1. These groups also recommended that subsection (d)(5) be expanded to list all of the 501(c) subsections that constitute the universe of charities that are licensed to conduct bingo. The comptroller declined to make these changes as the proposed language is contrary to Tax Code, §171.0002(c), which specifically referred only to §501(c)(3).

This new section is adopted under Tax Code, §111.002 and §111.022, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This new section implements Tax Code, §171.0002.

§3.581. Margin: Taxable and Nontaxable Entities.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Banking corporation--Each state, national, domestic, or foreign bank, whether organized under the laws of this state, another state, or another country, or under federal law, including a limited banking association organized under Finance Code, Title 3, Subtitle A, and each bank organized under §25(a), Federal Reserve Act (12 U.S.C. §§611 - 631) (edge corporations), but does not include a bank holding company as that term is defined by Bank Holding Company Act of 1956, §2, (12 U.S.C. §1841).

(2) Business trust--An entity as defined by Internal Revenue Code, Treasury Regulation, §301.7701-4(b).

(3) Corporation--An entity formed pursuant to Business Corporation Act, Non-Profit Corporation Act, Professional Corporation Act, or Business Organizations Code, Title 2 or 7, or other equivalent statute of this state or of another jurisdiction.

(4) Escrow--A legal arrangement whereby an asset is delivered to a third party to be held in trust or otherwise pending a contingency or the fulfillment of a condition or conditions in a contract.

(5) Estate of a natural person--An entity as defined by Internal Revenue Code, §7701(a)(30)(D), excluding an estate taxable as a business entity pursuant to Internal Revenue Code, Treasury Regulation, §301.7701-4(b). An estate of a natural person shall include a trust that makes an election under Internal Revenue Code, §645 to be treated and taxed as part of an estate for federal income tax purposes.

(6) General partnership--A partnership as described in Revised Partnership Act, Article 6132b-1.01 et. seq., or Business Organizations Code, Title 4, Chapter 152, or an equivalent statute in another jurisdiction.

(7) Grantor trust--A trust as defined by Internal Revenue Code, §671 and §7701(a)(30)(E), excluding a trust taxable as a business entity pursuant to Treasury Regulation, §301.7701-4(b).

(8) Holding company--An entity that confines its activities to owning stock in, and supervising management of, other companies.

(9) Joint stock company--A common-law unincorporated business enterprise of natural persons possessing common capital with ownership interests represented by shares of stock.

(10) Joint Venture--A partnership engaged in the joint prosecution of a particular transaction for mutual profit.

(11) Limited liability company--An entity formed pursuant to Limited Liability Company Act, Article 1528n, or Business Organizations Code, Title 3 or 7, or an equivalent statute in another jurisdiction.

(12) Limited liability partnership--A partnership registered pursuant to Revised Partnership Act, Article 6132b-3.08, or Business Organizations Code, Title 4, Chapters 152 and 153, Subchapter H, or an equivalent statute in another jurisdiction.

(13) Limited partnership--A partnership formed pursuant to Revised Partnership Act, Article 6132a-1 or Business Organizations Code, Title 4, Chapter 153, or an equivalent statute in another jurisdiction.

(14) Natural person--A human being or the estate of a human being. The term does not include a purely legal entity given recognition as the possessor of rights, privileges, and responsibilities, such as a corporation, limited liability company, partnership, or trust.

(15) Partnership--A relationship referred to in Business Organizations Code, §152.051, and Revised Partnership Act, Article 6132b-2.02.

(16) Passive entity--A general or limited partnership or trust other than a business trust that meets the qualifications in Tax Code, §171.0003. See also §3.582 of this title (relating to Margin: Passive Entities).

(17) Professional association--An entity organized under Professional Association Act, Article 1528e, or Business Organizations Code, Title 7, Chapter 302, or an equivalent statute in another jurisdiction.

(18) Qualified REIT subsidiary--An entity as defined by Internal Revenue Code, §856(i)(2).

(19) Real Estate Investment Trust or REIT--An entity as defined by Internal Revenue Code, §856.

(20) Real Estate Mortgage Investment Conduit or REMIC--An entity as defined by Internal Revenue Code, §860D.

(21) Savings and loan association--A savings and loan association or savings bank, whether organized under the laws of this state, another state, or another country, or under federal law.

(22) Self-insurance trust--A trust created and operated according to the provisions of Insurance Code, Chapter 2212, or a predecessor statute.

(23) Sole proprietorship--A natural person carrying on business, if the business is not formed in a manner that limits the liability of the owner. It does not include other entities treated as sole proprietorships for federal tax purposes, unless by statute the form of entity does not afford limited liability protection to the owner and it does not include single member limited liability companies.

(c) Taxable entities include:

(1) partnerships, both general and limited, unless excluded in subsection (d)(2) of this section;

(2) limited liability partnerships;

(3) corporations;

(4) banking corporations;

(5) savings and loan associations;

(6) limited liability companies;

(7) business trusts;

(8) professional associations;

(9) business associations;

(10) joint ventures, except joint operating or co-ownership arrangements meeting the requirements of Treasury Regulation 1.761-2(a)(3) that elect out of federal partnership treatment as provided by Internal Revenue Code, §761(a);

(11) joint stock companies;

(12) holding companies;

(13) combined groups (also see §3.590 of this title (relating to Margin: Combined Reporting)); and

(14) other legal entities.

(d) Nontaxable entities. The following entities are specifically excluded from the definition of taxable entities for purposes of imposition of the franchise tax:

(1) sole proprietorships (does not include single member limited liability companies);

(2) general partnerships where direct ownership is composed entirely of natural persons, and the liability of those persons is not limited (e.g. by registration as a limited liability partnership) under a statute of this state or another state;

(3) passive entities, as determined on a year to year basis (also see §3.582 of this title);

(4) entities exempt under Chapter 171, Subchapter B;

(5) grantor trusts, all of the grantors and beneficiaries of which are natural persons or charitable entities as described in Internal Revenue Code, §501(c)(3);

(6) estates of a natural person;

(7) escrows;

(8) REITs or qualified REIT subsidiaries provided that:

(A) the REIT holds interests in limited partnerships or other entities that are taxable entities and directly hold real estate; and

(B) the REIT does not directly hold real estate, other than real estate it occupies for business purposes; or

(9) REMICs;

(10) nonprofit self-insurance trusts;

(11) trusts qualified under Internal Revenue Code, §401(a); or

(12) trusts or other entities that are exempt under Internal Revenue Code, §501(c)(9).

(e) Single member limited liability company. An entity treated as a sole proprietorship for federal tax purposes is not a sole proprietorship for the purposes of this rule if it is formed in a manner that limits the liability of its owners or members.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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34 TAC §3.582

The Comptroller of Public Accounts adopts new §3.582, concerning margin: passive entities, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6273).

This section implements House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines to determine the qualification of an entity as passive under Tax Code, Chapter 171. Subsection (a) provides that

this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) lists the types of entities that may qualify as passive entities and the types of income that qualify as passive income. Subsection (d) lists certain income that is not considered passive. Subsection (e) provides that a passive entity may not receive more than 10% of its federal gross income from conducting an active trade or business. Subsection (f) lists activities that do not constitute an active trade or business. Subsection (g) establishes the reporting requirements for a passive entity.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Texas Society of Certified Public Accountants (TSCPA) recommended adding "Texas" in front of Revised Limited Partnership Act and Business Organizations Code in subsection (b)(4) - (5). The comptroller declines as, per the Secretary of State, "Texas" is implicit in the title of the bills provided.

The State Bar of Texas, Section of Taxation (SBT), TSCPA and the Texas Taxpayers and Research Association (TTARA) recommended removing the word "net" from the net capital gains definition in subsection (b)(7) and the word "net" from the "net gains" definition in subsection (b)(8). The comptroller declined to make this change. Tax Code, §171.0003(a) specifies that the determination as a passive entity is based on an entity's federal gross income. Net capital gains and net gains are included in federal gross income.

The TSCPA recommended amending subsection (b)(9) to define a "non-controlling interest" as "less than or equal to 50%". The comptroller agreed and has amended subsection (b)(9) accordingly.

TTARA recommended that the word "interest", used in the definition of the term "non-controlling interest" in subsection (b)(9) be defined. The comptroller declined. The determination of "non-controlling interest" is fact specific and will be determined on a case-by-case basis.

TTARA commented that they have found no statutory basis for the less than 50% interest requirement in the definition of a "security" in subsection (b)(9). The comptroller declined to make an amendment. A reasonable interpretation of the statute implies that a controlling interest cannot be considered passive.

The SBT recommended that the term "securities", as defined in subsection (b)(10), be given the same meaning given to the term in Vernon's Texas Civil Statutes, Securities Act, Article 581-4. The SBT also noted that limiting the term "securities" to include only "non-controlling" interests is inconsistent with Legislative intent. The comptroller declined to make these changes. The definition of the term "securities" in the Securities Act is for regulatory purposes. The definition of "securities" adopted in the rule is considered with both the definition of "securities" in other parts of the bill and the intent of §171.0003 that holdings of "securities" must be passive (i.e. non-controlling).

The TSCPA recommended removing the term "non-controlling" from the definition of "security" in subsection (b)(10). The comptroller declined because removing "non-controlling" would include "controlling interest" which cannot be considered passive.

The SBT recommended that subsection (c)(1) be revised to add language specifying that a "limited liability partnership", as a type of general partnership, can qualify as a "passive entity". The comptroller agreed and has amended subsection (c)(1) accordingly.

SBT recommended that subsections (c)(2) and (e) be clarified to state that the 90% passive income test and the 10% active income test provisions apply with respect to the gross income for the period on which margin is based. The comptroller agreed and has amended subsections (c)(2) and (e) accordingly.

The SBT and the TSCPA recommended changing the language in subsection (c)(2)(C) to eliminate the use of the word "net" to make the rule consistent with the statute. The comptroller declined to make this change. Subsection (c)(2) specifies that the list of items in the subparagraph are sources of federal gross income. Net gains are included in federal gross income, not gains. If gains were allowed, passive income could exceed federal gross income. The use of net gains makes the numerator and the denominator of the federal gross income ratio consistent.

The TSCPA recommended amending subsection (c)(2)(C) to include additional guidance or clarification as to sources of income considered "passive", using an Internal Revenue Code, §338(h)(10) gain as an example. The comptroller declined to make this addition. The determination of passive income is derived from lines on the federal income tax return. Therefore, it is implicit that the comptroller follow the federal law for those underlying items as stated in Tax Code, §171.1011(b).

The SBT recommended that subsection (c)(2)(D) be revised to specify that income from "nonoperating working interests" qualify as passive income, unless the operator of the property is a member of the owner's affiliated group. The comptroller agreed and has amended subsection (c)(2)(D) accordingly.

The SBT recommended adding subsection (c)(3) to allow an Internal Revenue Code, §338(h)(10) gain to be treated as a gain from the sale of a security for purposes of determining if the entity qualifies as a passive entity. The comptroller declined to make this addition. The determination of passive income is derived from lines on the federal income tax return. Therefore, it is implicit that the comptroller follow the federal law for those underlying items as stated in Tax Code, §171.1011(b).

The SBT recommended that the last sentence in subsection (e) be amended to make clear that any of the specifically enumerated items of income that may satisfy the 90% test cannot be treated as active income for purposes of the 10% test, regardless of whether that income would be viewed as having been generated from an active trade or business. The comptroller declined to make this change as it is not supported by the statute. See Tax Code, §171.0004.

This new section is adopted under Tax Code, §111.002 and §111.022, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This new section implements Tax Code, §171.0003.

§3.582. Margin: Passive Entities.

(a) Effective Date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Active trade or business--For the purposes of this section only:

(A) an entity conducts an active trade or business if the activities include active operations that form a part of the process of earning income or profit, and the entity performs active management and operational functions;

(B) activities performed by the entity include activities performed by persons outside the entity, including independent contractors, to the extent that the persons perform services on behalf of the entity and those services constitute all or part of the entity's trade or business; or

(C) an entity conducts an active trade or business if assets, including royalties, patents, trademarks, and other intangible assets, held by the entity are used in the active trade or business of one or more related entities.

(2) Business trust--An entity as defined by Internal Revenue Code, Treasury Regulation, §301.7701-4(b).

(3) Federal gross income--Gross income as defined in Internal Revenue Code, §61(a).

(4) General partnership--A partnership as described in Revised Partnership Act, Article 6132b-1.01 et. seq., or Business Organizations Code, Title 4, Chapter 152, or an equivalent statute in another jurisdiction.

(5) Limited liability partnership--A partnership registered pursuant to Revised Partnership Act, Article 6132b-3.08, or Business Organizations Code, Title 4, Chapters 152 and 153, Subchapter H, or an equivalent statute in another jurisdiction.

(6) Limited partnership--A partnership formed pursuant to Revised Partnership Act, Article 6132a-1, or Business Organizations Code, Title 4, Chapter 153, or an equivalent statute in another jurisdiction.

(7) Net capital gains--Net capital gains as defined under the Internal Revenue Code.

(8) Net gains--Net gains as defined under the Internal Revenue Code.

(9) Non-controlling interest--For the purposes of this section only, an interest that is less than or equal to 50% that is held by an investor, either directly or indirectly, in an investee.

(10) Security--

(A) an instrument defined by Internal Revenue Code, §475(c)(2), where the holder of the instrument has a non-controlling interest in the issuer/investee;

(B) an instrument described by Internal Revenue Code, §475(e)(2)(B), (C), (D);

(C) an interest in a partnership where the investor has a non-controlling interest in the investee;

(D) an interest in a limited liability company where the investor has a non-controlling interest in the investee; or

(E) a beneficial interest in a trust where the investor has a non-controlling interest in the investee.

(c) Qualification as a passive entity:

(1) to qualify as a passive entity, the entity must be one of the following for the entire period on which the tax is based:

(A) general partnership;

(B) limited partnership;

(C) limited liability partnership; or

(D) trust, other than a business trust; and

(2) at least 90% of an entity's federal gross income for the period on which margin is based must consist of the following sources of income:

(A) dividends, interest, foreign currency exchange gain, periodic and nonperiodic payments with respect to notional principal contracts, option premiums, cash settlements or termination payments with respect to a financial instrument, and income from a limited liability company;

(B) distributive shares of partnership income to the extent that those distributive shares of income are greater than zero;

(C) net capital gains from the sale of real property, net gains from the sale of commodities traded on a commodities exchange, and net gains from the sale of securities; and

(D) royalties from mineral properties, bonuses from mineral properties, delay rental income from mineral properties and income from other nonoperating mineral interests including nonoperating working interests not described in subsection (d)(2) of this section.

(d) The income described by subsection (c)(2) of this section, does not include:

(1) rent; or

(2) income received by a nonoperator from mineral properties under a joint operating agreement if the nonoperator is a member of an affiliated group and another member of that group is the operator under the same joint operating agreement.

(e) Conducting an active trade or business. To be considered a passive entity, an entity may not receive more than 10% of its federal gross income for the period on which margin is based from conducting an active trade or business. Income described by subsection (c)(2) of this section, may not be treated as income from conducting an active trade or business.

(f) Activities that do not constitute an active trade or business:

(1) ownership of a royalty interest or a nonoperating working interest in mineral rights;

(2) payment of compensation to employees or independent contractors for financial or legal services reasonably necessary for the operation of the entity; and

(3) holding a seat on the board of directors of an entity does not, by itself, constitute conduct of an active trade or business.

(g) Reporting requirement for a passive entity. If an entity meets all of the qualifications of a passive entity for the reporting period, the entity will owe no tax; however, the entity must file information to verify that the passive entity qualifications are met each year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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34 TAC §3.583

The Comptroller of Public Accounts adopts new §3.583, concerning margin: exemptions, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6274).

This section implements House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, adding Tax Code, §171.088, which extends to entities other than corporations certain specific exemptions from franchise tax available to corporations, provided the entity qualifies for the exemption in the same manner and under the same conditions as a corporation. Subsection (a) provides that this section only applies to franchise tax reports due on or after January 1, 2008. Subsection (b) explains how to apply for a franchise tax exemption and identifies the information that must accompany the application. Subsection (c) describes the possible actions that the comptroller will take after considering the application. Subsection (d) describes the qualifications necessary to qualify for exemption as: an entity subject to insurance premiums taxes, an entity promoting the public interest, a religious organization, a charitable organization, an educational organization and a homeowners' association. Subsection (e) addresses the effects of a revocation, withdrawal or loss of an exemption and the notification responsibilities of the affected entity. Subsection (f) provides that an entity that is exempt from federal income tax under one of certain specified paragraphs of Internal Revenue Code (IRC), §501(c) establishes its exempt status by providing a copy of a current exemption letter from the Internal Revenue Service to the comptroller. Subsection (g) describes the essential attributes of a solar energy device to qualify for exemption under Tax Code, §171.056. Subsection (h) provides that an entity engaged solely in the business of recycling sludge, as defined in the Health & Safety Code, is exempt from franchise tax. Subsection (i) identifies certain entities that may apply for a provisional or temporary exemption and describes the information that must accompany the application. Subsection (j) addresses the requirements necessary for an entity to qualify for the trade show exemption and provides for notification requirements in certain circumstances. Subsection (k) provides that an entity organized under 12 U.S.C., §2071, or an agricultural credit association regulated by the Farm Credit Administration is exempt from franchise tax.

The Tax Section of the State Bar of Texas (SBT) submitted three comments and the Texas Society of Certified Public Accountants (TSCPA) submitted one, a summary of which, and the related responses, follow.

SBT recommended language be added to subsection (b) advising that an application for exemption is unnecessary for entities previously exempted from the tax. Language to that effect has been added to subsection (b)

SBT recommended that the reference to subsection (e) in the first sentence of subsection (b)(2) be changed to subsection (f). The comptroller concurs in the recommendation and the requested change has been made.

The comptroller revised subsection (b)(2)(C) to clarify that Texas entities that have current organizational documents on file with the Texas Secretary of State do not have to submit copies of those documents with a request for exemption.

TSCPA views the provisions of subsection (c)(2), concerning the procedures for an entity to challenge a denial or revocation of an exemption by the comptroller, as lacking statutory support. The comptroller disagrees: the rule language is consistent with the provisions of Tax Code, Chapter 111, as well as an existing comptroller rule.

The comptroller has clarified the organizational distinctions among the entities that qualify for the exemptions under subsections (f) and (i), pertaining to certain entities qualifying for franchise tax exemption by reason of being exempt from federal income tax as an entity described in one of certain paragraphs of IRC, §501(c).

SBT also recommended that the rule be revised to clarify what must be included in the organizational documents of an entity that is not a corporation for it to qualify for an exemption granted to a "nonprofit corporation" and to provide a safe harbor for those entities claiming exemption under certain sections of Tax Code, Chapter 171, Subchapter B. Application forms for applying for an exemption will provide guidance concerning the organizational documents to be submitted for entities other than corporations and the required content of those documents to satisfy a nonprofit requirement.

This new section is adopted under Tax Code, §111.002 and §111.022, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This new section implements Tax Code, §171.0002 and §171.088.

§3.583. Margin: Exemptions.

(a) Effective date. This section applies to franchise tax reports originally due on or after January 1, 2008.

(b) Application for exemption. An entity that has not previously established an exemption from franchise tax with the comptroller must apply for an exemption. An entity that is not a corporation, but whose activities would qualify it for a specific exemption under Tax Code, Chapter 171, Subchapter B, if it were a corporation, may qualify for the exemption from the tax in the same manner and under the same conditions as a corporation. See Tax Code, §171.088. For provisional exemptions for certain entities, see subsection (i) of this section; for trade show exemptions, see subsection (j) of this section.

(1) An entity that believes it is exempt from payment of franchise tax must furnish to the comptroller sufficient evidence to establish its exempt status. The entity claiming the exemption bears the burden to establish its entitlement to exempt status and any doubts will result in a denial of the application for exemption.

(2) Except as otherwise provided in subsections (f), (i), and (j) of this section, each entity must submit to the comptroller:

(A) a request for exemption in writing, which may require using forms developed by the comptroller for requesting exemptions, indicating the particular provision of Tax Code, Chapter 171, under which exemption is claimed;

(B) a detailed statement of the entity's past and current activities, if any, and its future plan of activities, both in relation to the manner in which the entity proposes to implement the purposes clause in its certificate of formation or application for registration;

(C) an entity formed or created under Texas law whose articles of organization or formation is on file with the Texas Secretary of State need not submit copies of those documents with its request for exemption. A Texas entity that is not required to file organizational documents with the Texas Secretary of State must furnish a signed and dated copy of its organizational documents with its exemption request. If a non-Texas entity is required to file articles of organization or formation with its home jurisdiction Secretary of State, or other designated agency or officer, the entity must provide file-stamped copies of those filed organizational or formation documents. If a non-Texas entity is not required to file its articles of organization with the Secretary of State or other authority of its home jurisdiction, it must furnish a signed and dated copy of its organizational or formation documents with its exemption request; and

(D) any additional information the comptroller may require to make a determination whether the entity is eligible for a franchise tax exemption.

(c) Actions by comptroller. Upon receipt of an application for exemption, the comptroller's representative will review the application and send the applicant a notification either granting the exemption or denying the exemption, or requesting additional information.

(1) If the exemption is granted, the exemption will be effective from the first date the entity was eligible for exemption. If the entity paid any franchise taxes prior to the comptroller's notification granting the exemption for a privilege period after the effective date of the exemption, the entity may request a refund, subject to the applicable statute of limitations. If the effective date of the exemption occurs after the beginning of a privilege period, the entity must pay through the end of such privilege period. An entity that has been subject to the tax and becomes eligible for exemption is liable for Tax Code, §171.0011, additional tax.

(2) If the exemption is denied or revoked, the entity may contest the denial or revocation by filing all reports due as required by the comptroller; and

(A) paying all amounts of tax, penalty, and interest due and requesting a refund hearing pursuant to the provisions of Tax Code, Chapter 111;

(B) paying all amounts of tax, penalty, and interest due, accompanying the payment with a written protest, and filing suit for the recovery of amounts paid pursuant to the provisions of Tax Code, Chapter 112; or

(C) requesting a redetermination hearing pursuant to Tax Code, §111.009, if the comptroller issues a deficiency determination.

(d) Qualification for exemption.

(1) Entities subject to insurance premium taxes. All insurance, surety, guaranty, fidelity and title insurance companies, title insurance agents, and other insurance organizations that are subject to the annual gross premiums tax levied by Insurance Code, Chapters 221 - 224, are exempt from payment of the franchise tax, regardless of whether any gross premiums taxes are actually paid in any given year. A non-admitted insurance company or organization that is required to pay a gross premium receipts tax during a tax year is exempted from the franchise tax for the same tax year. The exemption in this paragraph covers the periods upon which the franchise tax is based, provided the gross premium receipts tax is required to be paid on premiums received or written, as applicable, during the same period. For example, an insurance organization's gross premium receipts tax is due and payable on March 1, 2009, for premiums received during calendar year 2008. The entity would be exempt from franchise tax for the 2009 annual report covering the January 1, 2009 - December 31, 2009, privilege period, for margin attributable to calendar year 2008. An entity is subject to the franchise tax, however, for a tax year in any portion of which it is in violation of an order issued by the Texas Department of Insurance under Insurance Code, §2254.003(b) that is final after appeal or that is no longer subject to appeal.

(2) Those entities organized for the exclusive purpose of promoting the public interest of any county, city, town, or other area within the state, must show that promotion of the public interest is the exclusive purpose of the entity and not merely an incidental result. An entity will not be considered to be promoting the public interest if it engages in activities to promote or protect the private, business, or professional interests of its members or patronage.

(3) A nonprofit entity seeking franchise tax exemption as a religious organization must be an organized group of people regularly meeting for the primary purpose of holding, conducting, and sponsoring religious worship services according to the rites of their sect. The entity must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An entity that supports and encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with a religious understanding, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of entities that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups that meet for the purpose of holding prayer meetings, Bible study or revivals. Although these organizations do not qualify for exemption under this category of exemption as religious organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the Internal Revenue Service (IRS) under Internal Revenue Code (IRC), §501(c).

(4) A nonprofit entity seeking a franchise tax exemption as organized for purely public charity must devote all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If an entity engages in any substantial activity other than the activities that are described in this paragraph, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. Even though not organized for profit and performing services that are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision. Although these organizations do not qualify for exemption under this category of exemption as charitable organizations, they may qualify for the exemption under Tax

Code, §171.063, if they obtain an exemption from the IRS under IRC, §501(c).

(5) A nonprofit entity seeking a franchise tax exemption as an educational organization must show that its activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An entity that has activities consisting solely of presenting public discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The entity will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Although these organizations do not qualify for exemption under this category of exemption as educational organizations, they may qualify for the exemption under Tax Code, §171.063, if they obtain an exemption from the IRS under IRC, §501(c).

(6) A nonprofit entity requesting franchise tax exemption as a homeowners' association must prove that it meets all requirements to qualify for the exemption. The entity must show that it is organized and operated to obtain, manage, construct, and maintain the property in or of a residential condominium or residential real estate development. The entity also must prove that the condominium project, or, for a real estate development, the related property, is legally restricted for use as residences. Furthermore, the entity must establish that the collective resident owners of individual lots, residences or units control at least 51% of the votes of the entity and that voting control, however acquired, is not held by: a single individual or family; one or more developers, declarants, banks, investors, or other similar parties. For example, an association is formed for a residential condominium consisting of 12 units with each unit being entitled to one vote. Each of five individuals separately owns and occupies one unit, a total of five units. A sixth individual owns two units, living in one unit and leasing the other. A seventh individual owns and leases the remaining five units. None of the owners are related. In determining whether the collective resident owners control at least 51% of the votes of the organization, the sixth owner is a resident owner regarding the one unit in which the owner lives and an investor regarding the other. The collective resident owners, therefore, have a total of six votes. Consequently, since the collective resident owners only have 50% of the votes of the entity, the association does not meet the requirement that the resident owners must control at least 51% of the votes of the organization. Accordingly, the entity does not qualify for the franchise tax exemption as a homeowners' association.

(e) Revocation, withdrawal, or loss of exemptions.

(1) An entity that no longer qualifies for the franchise tax exemption is required to notify the comptroller in writing of its change in status. Except as provided in paragraph (2) of this subsection, if at any time the comptroller has reason to believe that an exempt entity no longer qualifies for exemption, the comptroller's representative will notify the entity that its exempt status is under review. The comptroller's representative may request additional information necessary to ascertain the continued validity of the entity's exempt status. If the comptroller determines that an entity is no longer entitled to its exemption, notification to that effect will be sent to the entity. The effective date of revocation is the date the entity no longer qualified for the exemption. The day immediately following the date of withdrawal, loss, or revocation shall be the beginning date for determining the entity's privilege period and for all other purposes related to franchise tax.

(2) For nonprofit entities granted an exemption under Tax Code, §171.063, the revocation, withdrawal, or loss of the federal income tax exemption automatically terminates the franchise tax exemption. A nonprofit entity that no longer qualifies for the federal income tax exemption which was the basis for obtaining the franchise tax exemption must notify the comptroller in writing within 30 days of its change in status and must provide a copy of the notice of such revocation, withdrawal, or loss. The effective date of withdrawal or loss is the date of withdrawal or loss of the federal tax exemption. The effective date of a revocation is the date the IRS serves written notice of the revocation to the non-profit entity or the date the IRS serves written notice of revocation to the comptroller, whichever is earlier. The day immediately following the date of withdrawal, loss, or revocation shall be the entity's beginning date for determining its privilege periods and for all other purposes of the franchise tax.

(3) An electric cooperative entity previously exempted from franchise tax under Tax Code, §171.079, that subsequently participates in a joint powers agency thereby loses its franchise tax exemption. The commencing date of participation in the joint powers agency shall be considered the entity's beginning date for purposes of determining the entity's privilege periods and for all other purposes of the franchise tax. The electric cooperative must notify the comptroller in writing that it is a participant in a joint powers agency within 30 days after the commencing date of its participation.

(f) Federal exemption. An entity meeting the requirements of any paragraph of this subsection establishes its exempt status by furnishing to the comptroller a copy of a current exemption letter from the IRS.

(1) A nonprofit entity that has been exempted from federal income tax under the provisions of IRC, §501(c)(3), (4), (5), (6), (7), (8), (9), (10), (19); or

(2) any entity that has been exempted from federal income tax under the provisions of IRC, §501(c)(2) or (25), if the entity or entities for which it holds title to property are either exempt from or not subject to the franchise tax; and

(3) any entity that has been exempted from federal income tax under IRC, §501(c)(16).

(g) Solar energy device. For purposes of Tax Code, §171.056, the term "solar energy device" includes, but is not limited to:

(1) devices used in the conversion of solar thermal energy into electrical or mechanical power;

(2) devices used in the photovoltaic (solar cell) generation of electricity;

(3) systems used in the heating of water and the heating and cooling of structures by use of solar collectors to gather the sun's energy; and

(4) heat pumps used as an integral part of a system designed to make the best combined use of solar energy and conventional heating.

(h) Exemption for recycling operation. An entity engaged solely in the business of recycling sludge as defined by Health and

Safety Code, Chapter 361, Solid Waste Disposal Act, §361.003, is exempt from franchise tax.

(i) Provisional exemptions.

(1) If established with the comptroller, the following entities may be granted a temporary exemption from franchise tax:

(A) a nonprofit entity that has applied for exemption from federal income tax under IRC, §501(c)(3), (4), (5), (6), (7), (8), (9), (10), (16), or (19); or

(B) an entity that has applied for exemption from federal income tax under IRC, §501(c)(2) or (25), if the entity or entities for which it holds title to property is either exempt from or not subject to the franchise tax; and

(C) an entity that has applied for exemption from federal income tax under IRC, §501(c)(16).

(2) To obtain a temporary franchise tax exemption with the comptroller, an entity that has applied for but has not yet received a letter of exemption from the IRS must timely file with the comptroller:

(A) a copy of the application for recognition of exemption that has been filed with the IRS; and

(B) a copy of:

(i) a written notice from the IRS stating that the application for recognition of exemption has been received; or

(ii) a receipt as proof that the application has been sent to the IRS by means of the United States Postal Service, other carrier, or hand delivery to the IRS.

(3) Paragraphs (2)(A) and (2)(B)(ii) of this subsection, apply only if the organization has filed its application for recognition of exemption during the 14th or 15th month after its beginning date. Beginning date means:

(A) for an entity organized under the laws of this state, the date on which the entity's certificate of formation or other similar document takes effect; and

(B) for a foreign entity, the date on which the entity begins doing business in this state.

(4) If the information required in paragraphs (2)(A) and (2)(B)(i) of this subsection is provided in a timely manner, a 90-day provisional franchise tax exemption will be granted.

(5) An entity qualifying under paragraphs (2)(A) and (2)(B)(ii) of this subsection, will be granted a 90-day provisional exemption with the condition that a copy of the notice required in paragraph (2)(B)(i) of this subsection be provided to the comptroller within 30 days from the date of the letter notifying the entity of the provisional exemption. If the IRS notification is not provided within the 30-day period, the provisional exemption will be canceled. An entity whose provisional exemption is canceled will be subject to all tax, penalty, and interest that has accrued since the entity's beginning date.

(6) The information necessary for obtaining a temporary franchise tax exemption will be considered to be provided to the comptroller in a timely manner if:

(A) the application for recognition of exemption is provided to the IRS within their timely filing guidelines; and

(B) the information required in paragraphs (2)(A) and (2)(B)(i) or (2)(B)(ii) of this subsection, is postmarked within 15 months after the day that is the last day of a calendar month and that is nearest to the entity's beginning date.

(7) Before the expiration of the 90-day provisional exemption, the entity must provide the comptroller a copy of the letter from the IRS showing that the decision on the federal exemption is still pending or stating that the federal exemption is either granted or denied.

(8) If the comptroller is notified as required in paragraph (7) of this subsection, that the decision on the federal exemption is still pending, an extension of the provisional exemption may be considered.

(9) If the information in paragraph (7) of this subsection, is not provided as required, the provisional exemption may be canceled. If the provisional exemption is canceled, the entity will be responsible for all franchise tax reports and payments that have become due since its beginning date, and penalty and interest will be based on the original due date of each report.

(10) An entity that provides the comptroller a copy of the letter from the IRS stating that the federal exemption has been granted will be considered for franchise tax exemption under subsection (e) of this section.

(11) If the federal exemption is denied by the IRS, the entity is responsible for all franchise tax reports and payments that have become due since its beginning date and interest will be based on the original due date of each report. Late filing and payment penalties will be waived for any reports and payments postmarked within 90 days after the date of the final denial of the federal exemption. The penalty waiver process will begin when the entity submits a written request for penalty waiver and a copy of the letter denying the federal exemption when filing reports and payment.

(j) Trade show exemption. See Tax Code, §171.084, for the requirements for exemption for certain foreign entities that participate in trade shows in Texas.

(1) Notification to comptroller. Entities need not apply for an exemption under Tax Code, §171.084.

(A) If a foreign entity has obtained a registration or has already notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing by the due date of the first report for which the entity is exempt that the report and payment are not due because the entity is exempt under Tax Code, §171.084. After such notification, the entity must notify the comptroller in writing only when the organization no longer qualifies for exemption.

(B) If a foreign entity has not obtained a registration or otherwise qualified to do business in the state, if applicable, and if the entity has not notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing only when the entity no longer qualifies for exemption under Tax Code, §171.084. There is no need to apply for exemption as long as the entity qualifies for the exemption.

(2) Solicitation periods. If the solicitation of orders is conducted during more than five periods during the business period upon which tax is based as set out in Tax Code, §171.1532, the entity does not qualify for exemption.

(A) An entity with its fiscal year ending December 31, 2008, that filed a 2008 annual report, will not have to file and pay a 2009 annual report if it did not solicit orders for more than five periods during 2008.

(B) Assume a foreign entity participated in its first trade show in Texas on April 1, 2008. It also participated in trade shows in 2009 on January 1, March 1, May 1, June 1, August 1, and October 1.

The entity's fiscal year ends are December 31, 2008, and 2009. The entity would be exempt for its initial report and payment (covering the privilege periods from April 1, 2008 - December 31, 2009) because it only solicited for one period from April 1, 2008 - December 31, 2008 (i.e., the business upon which the initial report is based). The entity would be required to file a 2010 annual report and pay tax, however, because it solicited for six periods from January 1, 2009 - December 31, 2009 (i.e., the period upon which the 2010 annual report is based).

(3) One hundred twenty hours. A solicitation period may not exceed 120 consecutive hours. If the solicitation of orders is conducted during a single period of more than 120 consecutive hours, the entity does not qualify for exemption. For example, an entity that meets the other requirements of Tax Code, §171.084, will meet the 120 hours requirement if the solicitation occurs Monday - Friday, but will not meet the 120 hours requirement if the solicitation occurs Monday - Saturday. If none of the solicitation limits prescribed in this subsection are exceeded, an entity may qualify for the exemption even if it leases space at a wholesale center for the entire period upon which the tax is based.

(k) An entity organized under 12 U.S.C. §2071, or an agricultural credit association regulated by the Farm Credit Administration is exempt from franchise tax.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706290
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2008
Proposal publication date: September 14, 2007
For further information, please call: (512) 475-0387

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34 TAC §3.584

The Comptroller of Public Accounts adopts new §3.584, concerning margin: reports and payments, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6278).

This section implements House Bill 3, 79th Legislature, Third Called Special Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for the filing of reports and payments under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) details the filing requirements for nontaxable entities. Subsection (c) details the types of franchise tax reports due, due dates and the accounting period to be used on the reports. Subsection (d) details the calculation of margin and the criteria for use of the 0.5% tax rate. This subsection also provides qualifications for the no tax due threshold, the discount and the E-Z Computation. Subsection (e) relates to the calculation of penalty and interest on delinquent taxes. Subsection (f) provides details on filing amended reports. Subsection (g) relates to the examination of an entity's records during a comptroller audit. Subsection (h) relates to the payment of an estimated liability. Subsection (i) provides requirements on filing a public information report or an ownership information report.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Section of Taxation of the State Bar of Texas (SBT) recommended changing subsection (c)(1) to properly reflect the provisions of the Bankruptcy Code. The comptroller agrees and subsection (c)(1) was modified accordingly.

The SBT recommended that subsection (c)(1)(B) and (C) be amended to clarify the method used when the accounting period on the initial or annual report differs from the taxable entity's federal income tax reporting periods. The Texas Society of Certified Public Accountants (TSCPA) also requested clarification when the accounting period for the initial report differs from that of the federal income tax return. Explanatory language was added.

The comptroller clarified in subsection (c)(1)(B) the privilege period for which the tax is paid when the first anniversary occurs during the period from October 4 - December 31.

The TSCPA recommended that subsection (c)(1)(H) be amended such that only the parent entity or primary reporting entity of a combined group be required to file a public information report. No change was made to the relevant parts of §Tax Code, §171.202 and §171.203, which requires that each separate entity doing business in this state or is authorized to do business in this state must file a public information report.

The SBT and TSCPA recommended that subsection (c)(1)(H) be clarified that a newly created entity that is a member of a combined group does not file an initial report and that the newly formed entity that joins a combined group does not require the combined group to file an initial report. Clarifying language was added to subsection (c)(1)(H) and §3.590(b).

The SBT and TSCPA recommended that we modify subsection (d)(1) so that the due date is the extended due date. No change was made as the due date referenced is the extended due date if there is a valid extension.

The comptroller clarified in subsection (d)(1) that an election for cost of goods sold or compensation must be made by the due date of the return. If no election is made, the margin is computed based on total revenue times 70%.

The SBT and TSCPA recommended that we modify subsection (d)(2) to clarify calculations for the tax rate applicable to retail and wholesale trades for a combined group. Clarification was added to §3.590(i).

The comptroller clarified in subsection (d)(6) that an upper tier entity does not qualify for the no tax due provisions, the discounts, or the E-Z Computation if the lower tier entity did not meet the criteria before attribution of any total revenue to the upper tier entity.

The Texas Oil and Gas Association (TxOGA) recommended changes to subsection (f) regarding the filing of amended reports due to an administrative proceeding or RAR. The comptroller declined to make this change since Tax Code, §171.212 did not change.

The SBT and TSCPA recommended we modify subsection (i)(3) to grant additional notice for failure to file or sign public information reports. Tax Code, §171.251 was not changed and the recommendation is contrary to statute, therefore no change was made. As a continuation of the comptroller's current policy, tax-

able entities are given notice and an opportunity to correct inadvertent failures.

The TSCPA requested a definition of "authorized person" and asked if this includes a Certified Public Accountant who is also the paid preparer. Subsection (i)(5) as proposed includes a definition of "authorized person". This definition was amended to include a paid preparer authorized to sign the report.

The TxOGA and Copano Energy recommended that we limit requirements for a public information report to those entities over which the Secretary of State has authority. The public information report and ownership information report will not be required for entities without nexus. Subsection (i)(6) was added accordingly.

This new rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new rule implements Tax Code, §§171.002, 171.0021, 171.101, 171.1016, 171.151, 171.152, 171.1532, 171.154, 171.201, 171.202, 171.203, and 171.212.

§3.584. Margin: Reports and Payments.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Nontaxable entities. See §3.581 of this title (relating to Margin: Taxable and Nontaxable Entities) for information concerning nontaxable entities. Notification to comptroller, except for passive entities, see §3.582 (relating to Margin: Passive Entities):

(1) If a taxable entity has notified the comptroller that it is doing business in Texas, the entity must notify the comptroller in writing by the due date of the first report for which the entity qualifies as a nontaxable entity that the report and payment are not due because the entity qualifies as a nontaxable entity. After such notification, the entity must notify the comptroller in writing only when the entity no longer qualifies as a nontaxable entity.

(2) If a nontaxable entity has not notified the comptroller that it is doing business in Texas, the nontaxable entity must notify the comptroller in writing only when the entity no longer qualifies as a nontaxable entity.

(c) Reports and due dates.

(1) Each taxable entity subject to the franchise tax levied by Tax Code, §171.001, must file an initial franchise tax report, and thereafter an annual franchise tax report, and at the same time must pay the franchise tax and any applicable penalties and interest due by the taxable entity. It is the responsibility of a receiver to file franchise tax reports and pay the franchise tax of a taxable entity in receivership. A debtor in possession or the appointed trustee or receiver of a taxable entity in reorganization or arrangement proceedings under the Bankruptcy Act is responsible for filing franchise tax reports and paying the franchise tax pursuant to the plan of reorganization or arrangement.

(A) "Beginning date" means:

(i) for a taxable entity chartered or organized in this state, the date on which the taxable entity's charter or organization takes effect; and

(ii) for a foreign taxable entity, the date on which the taxable entity begins doing business in this state.

(B) Initial report. Both the initial report and payment of the tax due, if any, are due no later than 89 days after the first anniversary date of the beginning date. The initial franchise tax report and payment are for the privilege periods beginning on the beginning date and ending on December 31 following the first anniversary of the beginning date. For example, if a Texas taxable entity is chartered on June 1, 2008, the payment due with the initial report will be for the privilege periods from June 1, 2008 - December 31, 2009. In addition, when the first anniversary occurs during the period from October 4 - December 31, the tax paid with the initial report is for an additional privilege period beginning on January 1 following the first anniversary and ending on the following December 31. For example, if a Texas taxable entity is chartered on November 1, 2008, the payment due with the initial report will be for the privilege periods from November 1, 2008 - December 31, 2010. The taxable margin computed on the initial report is based on the business done during the period beginning on the beginning date and ending on the last accounting period ending date for federal income tax purposes that is at least 60 days before the original due date of the initial report, or, if there is no such ending date, then ending on the day that is the last day of the calendar month nearest to the end of the taxable entity's first year of business. If the period used to compute business done for purposes of the initial report differs from the taxable entity's last accounting period for federal income tax purposes, then the taxable entity's total revenue for purposes of the initial report shall be computed as if the taxable entity had reported its federal taxable income on an Internal Revenue Service form covering the period used to compute business done for purposes of the initial report.

(C) Annual report. The annual franchise tax report must be filed and the tax paid no later than May 15 of each year. The annual tax is paid for the privilege period of the calendar year in which the report is due. The taxable margin computed on an annual report is based on the business done during the period beginning with the day after the last date upon which tax was computed under Tax Code, Chapter 171 on a previous report, and ending with the last accounting period ending date for federal income tax purposes ending in the calendar year before the calendar year in which the report is originally due, or, if there is no such ending date, then ending on December 31 of the calendar year before the calendar year in which the report is originally due. A taxable entity that uses a 52 - 53 week accounting year end and has an accounting year ending the first four days of January of the year in which the annual report is originally due may use the preceding December 31 as the date through which taxable margin is computed. If the period used to compute business done for purposes of the annual report differs from the taxable entity's last accounting period for federal income tax purposes, then the taxable entity's total revenue for purposes of the annual report shall be computed as if the taxable entity had reported its federal taxable income on an Internal Revenue Service form covering the period used to compute business done for purposes of the annual report.

(D) Extensions. See §3.1 of this title (relating to Request for extension of Time in Which to File Report), for extensions of time to file an initial or final report. See §3.585 of this title (relating to Margin: Extensions), for extensions of time to file an annual report.

(E) Final report. See §3.592 of this title (relating to Margin: Additional Tax) for information concerning the additional tax imposed by Tax Code, §171.0011.

(F) Transition. See §3.595 of this title (relating to Margin: Transition) for transitional information concerning tax rates and privilege periods as a result of certain legislative changes.

(G) Passive entities. See §3.582 of this title (relating to Margin: Passive Entities), for information concerning the reporting requirements for a passive entity.

(H) Combined reporting. Taxable entities that are part of an affiliated group engaged in a unitary business must file a com-

bined group report in lieu of individual reports, except that a public information report or ownership information report must be filed for each member of the combined group with nexus. A newly created taxable entity that is a member of a combined group is not required to report data on a separate initial report, and a combined group that would not otherwise be required to file an initial report shall not be required to file an initial report solely because a newly-created entity has become a member of the combined group. See §3.590 of this title (relating to Margin: Combined Reporting), for rules on filing a combined report.

(2) The postmark date (or meter-mark if there is no postmark) on the envelope in which the report or payment is received determines the date of filing.

(3) An information report must be filed, even if no tax is due. A taxable entity must file a no tax due information report for the privilege periods covered by an initial report or regular annual report in which no tax is due, as authorized under Tax Code, §171.204.

(d) Calculation of margin.

(1) Calculation. A taxable entity must make an annual election to deduct cost of goods sold or compensation by the due date of its return. If an election is not made by the due date of the return, the taxable entity's margin will be calculated as indicated in subparagraph (C) of this paragraph. This election may not be amended. A taxable entity's margin equals the least of three calculations:

(A) Total revenue minus cost of goods sold;

(B) Total revenue minus compensation; or

(C) Total revenue times 70%.

(2) Rate. A tax rate of 1.0% of taxable margin applies to most taxable entities. A tax rate of 0.5% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade under division F or G of the 1987 Standard Industrial Classification Manual published by the Federal Office of Management and Budget. A taxable entity is primarily engaged in retail or wholesale trade only if:

(A) the total revenue from its activities in retail and wholesale trade is greater than the total revenue from its activities in trades other than the retail and wholesale trade;

(B) less than 50% of the total revenue from activities in retail or wholesale trade comes from the sale of products it produces or products produced by an entity that is part of an affiliated group to which the taxable entity also belongs, except for those businesses under Major Group 58 (eating and drinking establishments); and

(C) the taxable entity does not provide retail or wholesale utilities, including telecommunications services, electricity or gas.

(3) No tax due. A taxable entity will owe no tax if its tax due is less than $1,000 or its total revenue is less than or equal to $300,000, or the amount determined under Tax Code, §171.006, per 12 month period on which the report is based. A taxable entity that does not owe any tax under this subsection must file a no tax due information report as authorized by subsection (c)(3) of this section.

(4) Discount. A taxable entity is entitled to a discount of the tax imposed as follows:

(A) If total revenue is greater than $300,000 and less than $400,000, the discount is 80% of tax due.

(B) If total revenue is greater than or equal to $400,000 and less than $500,000, the discount is 60% of tax due.

(C) If total revenue is greater than or equal to $500,000 and less than $700,000, the discount is 40% of tax due.

(D) If total revenue is greater than or equal to $700,000 and less than $900,000, the discount is 20% of tax due.

(5) E-Z Computation. A taxable entity with total revenue of $10 million or less may elect to pay the franchise tax by using the E-Z Computation method. Under the E-Z Computation a taxable entity's tax liability is computed by multiplying the taxable entity's total revenue times their apportionment factor times 0.575% (.00575) and subtracting any applicable discount as provided by paragraph (4) of this subsection. No other credits or adjustments are allowed if a taxable entity elects to compute its tax liability under the E-Z Computation.

(6) Tiered partnership.

(A) Paragraphs (3), (4) and (5) of this subsection, do not apply to an upper tier entity if, before the attribution of any total revenue by a lower tier entity to an upper tier entity, the lower tier entity does not meet the criteria.

(B) The lower tier entity must submit a report to the comptroller showing the amount of total revenue that each upper tier entity should include with the upper tier entity's own taxable margin calculation, according to the ownership interest of the upper tier entity.

(e) Penalty and interest on delinquent taxes.

(1) Tax Code, §171.362, imposes a 5.0% penalty on the amount of franchise tax due by a taxable entity that fails to report or pay the tax when due. If any part of the tax is not reported or paid within 30 days after the due date, an additional 5.0% penalty is imposed on the amount of tax unpaid. There is a minimum penalty of $1.00. Delinquent taxes accrue interest beginning 60 days after the due date. For example, if payment is made on the 61st day after the due date, one day's interest is due. The annual rate of interest on delinquent taxes is the prime rate plus one percent, as published in The Wall Street Journal on the first day of each calendar year that is not a Saturday, Sunday, or legal holiday.

(2) When a taxable entity is issued an audit assessment or other underpayment notice based on a deficiency, penalties under Tax Code, §171.362, and interest are applied as of the date that the underpaid tax was originally due, including any extensions, not from the date of the deficiency determination or date the deficiency determination is final.

(3) A deficiency determination is final 30 days after the date on which the service of the notice of the determination is completed. Service by mail is complete when the notice is deposited with the United States Postal Service.

(A) The amount of a determination is due and payable 10 days after it becomes final. If the amount of the determination is not paid within 10 days after the day it became final, a penalty under Tax Code, §111.0081, of 10% of the tax assessed will be added. For example, if a deficiency determination is made in the amount of $1,000 tax (plus the initial penalty and interest), but the total amount of the deficiency is not paid until the 41st day after the deficiency notice is served, $1,200 plus interest would be due (i.e., $1,000 tax, $100 initial penalty for not paying when originally due, $100 penalty for not paying deficiency determination within 10 days after it became final, plus interest accrued to the date of payment at the applicable statutory rate).

(B) A petition for redetermination must be filed within 30 days after the date on which the service of the notice of determination is completed, or the redetermination is barred.

(C) A decision on a petition for redetermination becomes final 20 days after service on the petitioner of the notice of the decision. The amount of a determination is due and payable 20 days after the decision is final. If the amount of the determination is

not paid within 20 days after the day the decision becomes final, a penalty under Tax Code, §111.0081, of 10% of the tax assessed will be added. Using the previous example, on the 41st day after service of the decision, $1,200 plus interest would be due (i.e., $1,000 tax, $100 initial penalty, $100 additional penalty and the applicable accrued interest).

(4) A jeopardy determination is final 20 days after the date on which the service of the notice is completed unless a petition for redetermination is filed before the determination becomes final. Service by mail is complete when the notice is deposited with the United States Postal Service. The amount of the determination is due and payable immediately. If the amount determined is not paid within 20 days from the date of service, a penalty, under Tax Code, §111.022, of 10% of the amount of tax and interest assessed will be added.

(5) If the comptroller determines that a taxable entity exercised reasonable diligence to comply with the statutory filing or payment requirements, the comptroller may waive penalties or interest for the late filing of a report or for a late payment. The taxable entity requesting waiver must furnish a detailed description of the circumstances that caused the late filing or late payment and the diligence exercised by the taxable entity in attempting to comply with the statutory requirements. See §3.5 of this title (relating to Waiver of Penalty or Interest) for additional information.

(6) If a taxable entity fails to comply with Tax Code, §171.212, the taxable entity is liable for a penalty of 10% of the tax that should have been reported and had not previously been reported to the comptroller under Tax Code, §171.212. This penalty is in addition to any other penalty provided by law.

(f) Amended reports. In filing an amended report, the taxable entity must type or print on the report, immediately above the taxable entity name, the phrase "Amended Report." The report should be forwarded with a cover letter of explanation, with enclosures necessary to support the amendment. Applicable penalties and interest must be reported and paid along with any additional amount of tax shown to be due on the amended report.

(1) A taxable entity may file an amended report for the purpose of correcting a mathematical or other error in a report or for the purpose of supporting a claim for refund. An amended report may not be filed to change between a cost of goods sold deduction and a compensation deduction.

(2) A taxable entity that has been audited by the Internal Revenue Service must file an amended franchise tax report within 120 days after the Revenue Agent's Report (RAR) is final, if the RAR results in changes to taxable margin reported for franchise tax purposes. An RAR is final when all administrative appeals with the Internal Revenue Service have been exhausted or waived. An administrative appeal with the Internal Revenue Service does not include an action or proceeding in the United States Tax Court or any other federal court.

(3) A taxable entity whose taxable margin is changed as a result of an audit or other adjustment by a competent authority other than the Internal Revenue Service must file an amended franchise tax report within 120 days after the adjustment is final. An adjustment is final when all administrative or other appeals have been exhausted or waived. For the purposes of this section, a competent authority includes, but is not limited to, the United States Tax Court, United States District Courts, United States Courts of Appeals, and United States Supreme Court.

(4) A taxable entity must file an amended franchise tax report within 120 days after the taxable entity files an amended federal income tax return that changes the taxable entity's taxable margin. A taxable entity is considered to have filed an amended federal income tax return if the taxable entity is a member of an affiliated group during a period in which an amended consolidated federal income tax return is filed.

(5) A final determination resulting from an Internal Revenue Service administrative proceeding (including an audit), or a judicial proceeding arising from an administrative proceeding, that affects the amount of franchise tax liability must be reported to the comptroller before the expiration of 120 days after the day on which the determination becomes final. See Tax Code, §111.206.

(6) Because the 10% penalty provided for in Tax Code, §171.212 only applies to deficiencies, failure to file an amended return in which a refund would result will not cause a 10% penalty to be imposed.

(g) Comptroller audit. During the course of an audit or other examination of a taxable entity's franchise tax account, the comptroller may examine financial statements, working papers, registers, memoranda, contracts, corporate minutes, and any other business papers used in connection with its accounting system. In connection with the examination, the comptroller may also examine any of the taxable entity's officers or employees under oath.

(h) Payment of determination. The payment of a determination issued to a taxable entity for an estimated tax liability shall not satisfy the reporting requirements set forth in Tax Code, Chapter 171, Subchapter E, concerning reports and records.

(i) Information report. Each taxable entity on which the franchise tax is imposed must file an information report.

(1) For a taxable entity other than a corporation or limited liability company, an ownership information report as described in Tax Code, §171.201 and §171.202 is due at the same time each initial and annual report is due.

(2) For a corporation or limited liability company a public information report as described in Tax Code, §171.203, is due at the same time each initial and annual report is due. An authorized person must sign the public information report on behalf of the taxable entity under a certification that:

(A) all information contained in the report is true and correct to the best of the authorized person's knowledge; and

(B) a copy of the report has been mailed to each person named in the report who is an officer, director, or manager and who is not employed by the taxable entity or a related (at least 10% ownership) taxable entity on the date the report is filed.

(C) A report that is filed electronically complies with the signature and certification requirements of this provision.

(3) Failure to file or sign a public information report or ownership information report shall result in the forfeiture of corporate or business privileges as provided by Tax Code, §171.251 and §171.2515. If the corporate or business privileges are forfeited, each officer or director of the taxable entity may be liable for each debt of the taxable entity that is created or incurred in Texas after the date on which the report is due and before the corporate or business privileges are revived, as provided by Tax Code, §171.255.

(4) The provisions of paragraph (3) of this subsection, concerning forfeiture of corporate privileges do not apply to a banking taxable entity or a savings and loan association, as defined in Tax Code, §171.001.

(5) For purposes of this subsection:

(A) authorized person means, in the case of a corporation, an officer, director or other authorized person of the corporation;

(B) authorized person means, in the case of a limited liability company, a member, manager or other authorized person of the limited liability company;

(C) authorized person means, in the case of a limited partnership, a partner or other authorized person of the partnership;

(D) director includes a manager of a limited liability company, a general partner in a limited partnership and a general partner in a partnership registered as a limited liability partnership;

(E) authorized person also includes a paid preparer authorized to sign the report.

(6) Taxable entities that are members of a combined group and do not have nexus in Texas are not required to file an ownership information report or a public information report.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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Proposal publication date: September 14, 2007
For further information, please call: (512) 475-0387

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34 TAC §3.585

The Comptroller of Public Accounts adopts new §3.585, concerning margin: annual report extensions, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6281).

This section implements House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for requesting extensions under Tax Code, Chapter 171. Subsection (a) provides the effective date. Subsection (c) provides guidance for an extension to November 15. Subsection (d) states an extension will not be granted by paying 100% of the tax paid in the previous year if no report was filed for the previous year, or due in the previous year. Subsection (e) provides guidance for calculating penalty and interest. Subsections (f) - (h) provide guidance for extensions for taxpayers required to file by electronic funds transfer. Subsection (i) states no additional extensions will be granted, other than those provided for in this section.

We received several comments from various groups. Following is a summary of the comments received and the responses.

The Texas Oil and Gas Association and the Texas Society of Certified Public Accountants requested that combined groups be allowed to use 100% of the prior year payment extension option for combined groups even if membership changes. The comptroller declined to make this change because it is difficult to administer for taxpayers and the comptroller and is therefore unreasonable.

The Texas Society of Certified Public Accountants asked for additional guidance on how to compute the prior year's tax when requesting an extension for a combined group. The comptroller agreed and provided in subsections (c)(3)(B) and (f)(3)(B) that a combined group may be granted an extension based on a prior year's tax if no new members were added. Also see §3.595 of this title for rules relating to newly taxable entities.

The Section of Taxation of the State Bar of Texas recommended an amendment to allow a combined group, in certain circumstances, to file an extension even though in the previous calendar year the combined group did not file a franchise tax report, provided, however, that in previous calendar year a member of the combined group filed a franchise tax report. The comptroller declined to make this change because it is inconsistent with the statute. See Tax Code, §171.202(c)(2)(B).

The Texas Taxpayers and Research Association (TTARA) commented that this section holds that an entity with no previous report is not entitled to an extension by remitting 100% of the tax due on the report for the previous year. TTARA claimed that §171.202 clearly allows this, stating the comptroller "shall" grant the extension. The comptroller declined to make this change because there was no tax "reported as due" in the previous year. See Tax Code, §171.202(c)(2)(B).

This new section is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §171.202.

§3.585. Margin: Annual Report Extensions.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Taxable and nontaxable entities. See §3.581 of this title (relating to Margin: Taxable and Nontaxable Entities) for a list of taxable and nontaxable entities.

(c) Extension to November 15. Except for a taxable entity which has been notified by the comptroller that it is required to make its franchise tax payments by electronic funds transfer (see subsections (d), (f), and (g) of this section), a taxable entity will be granted an extension to file an annual report on or before the next November 15, if the taxable entity:

(1) requests the extension on or before May 15;

(2) requests the extension on a form provided by the comptroller; and

(3) remits with the extension request:

(A) 90% or more of the amount of tax reported as due on the report filed on or before November 15; or

(B) 100% of the tax reported as due for the previous calendar year on the report due in the previous calendar year and filed on or before May 14 of the year for which the extension is requested. A combined group may only use this 100% option if the combined group has lost a member or if the members of the combined group are the same as they were on the last day of the period upon which the report due in the previous calendar year was based.

(d) No previous report. An extension shall not be granted under subsections (c)(3)(B) or (f)(3)(B) of this section, if no report was due in the previous calendar year or the report due in the previous calendar year is not filed on or before May 14 of the year for which the extension is requested.

(e) Penalty and interest. Penalty and interest, except for a taxable entity which has been notified by the comptroller that it is required to make its franchise tax payments by electronic funds transfer (see subsection (h) of this section), will be calculated as though the following were due dates.

(1) If a taxable entity is granted an extension and pays, on or before May 15, at least 100% of the tax reported as due for the previous calendar year on the report due in the previous calendar year and filed on or before May 14 of the year for which the extension is requested, then November 15 will be the due date for any additional tax due.

(2) If a taxable entity is granted an extension and pays on or before May 15, 90% or more of the tax which will be reported as due on or before November 15, then November 15 will be the due date for any additional tax due.

(3) If a taxable entity, on or before May 15, requests an extension but does not qualify for an extension under paragraphs (1) or (2) of this subsection, then May 15 is the due date for 90% of the tax finally determined to be due and November 15 is the due date for 10% of the tax finally determined to be due.

(f) Required electronic funds transfer extension to August 15. A taxable entity which has been notified by the comptroller that it is required to make its franchise tax payments by electronic funds transfer (see §3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers)) will be granted an extension to file an annual report on or before the next August 15, if the taxable entity:

(1) requests the extension on or before May 15;

(2) requests the extension on a form provided by the comptroller; and

(3) remits with the extension request:

(A) 90% or more of the amount of tax reported as due on the report filed on or before November 15; or

(B) 100% of the tax reported as due for the previous calendar year on the report due in the previous calendar year and filed on or before May 14 of the year for which the extension is requested. A combined group may only use this 100% option if the combined group has lost a member or if the members of the combined group are the same as they were on the last day of the period upon which the report due in the previous calendar year was based.

(g) Required electronic funds transfer extension to November 15. A taxable entity granted an extension under subsection (f) of this section, will be granted an extension to file an annual report on or before the next November 15, if the taxable entity:

(1) requests the extension on or before August 15;

(2) requests the extension on a form provided by the comptroller; and

(3) remits with the request the difference between the amount paid previously for the current reporting period and 100% of the amount of tax reported as due on the report filed on or before November 15.

(h) Required electronic funds transfer penalty and interest. Penalty and interest will be calculated as though the following were due dates.

(1) If a taxable entity is granted an extension until August 15 and pays, on or before May 15, at least 100% of the tax reported as due for the previous calendar year on the report due in the previous calendar year and filed on or before May 14 of the year for which the extension is requested, then August 15 will be the due date for any additional tax due. However, if the taxable entity requests, on or before August 15, an extension until November 15, and remits, on or before August 15, 99% of the amount reported as due on or before November 15, then November 15 will be the due date for any additional tax due.

(2) If a taxable entity is granted an extension until August 15 and pays, on or before May 15, 90% or more of the tax which will be reported as due on or before August 15, then August 15 will be the due date for any additional tax due. However, if the taxable entity requests, on or before August 15, an extension until November 15, and remits, on or before August 15, 99% of the amount reported as due on or before November 15, then November 15 will be the due date for any additional tax due.

(3) If a taxable entity, on or before May 15, requests an extension until August 15, but does not qualify for an extension under paragraphs (1) or (2) of this subsection, then May 15 is the due date for 90% of the tax finally determined to be due. August 15 is the due date for the remaining 10% of the tax finally determined to be due. However, if the taxable entity requests, on or before August 15, an extension until November 15, and remits on or before August 15 at least 99% of the amount reported as due on or before November 15, then May 15 is the due date for 90% of the amount reported as due on or before November 15, August 15 is the due date for 90% of the amount reported as due on or before November 15, and November 15 is the due date for any additional tax due.

(i) No additional extensions. No additional extensions will be granted for annual franchise tax reports pursuant to Tax Code, §111.057.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706296
Martin Cherry
General Counsel
Comptroller of Public Accounts
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Proposal publication date: September 14, 2007
For further information, please call: (512) 475-0387

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34 TAC §3.586

The Comptroller of Public Accounts adopts new §3.586, concerning margin: nexus, without changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6282).

This section implements House Bill 3, 79th Legislature, Third Called Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for determining nexus under Tax Code, Chapter 171. Subsection (a) provides the effective date. Subsection (b) states that Texas will find nexus to the limits of the United States Constitution. Subsection (c) provides a non-exclusive list of common activities which will subject a taxable entity to Texas franchise tax. Subsection (e) states Public Law 86-272 does not apply to the franchise tax.

We received several comments from various groups. Following is a summary of the comments received and the responses.

The Texas Society of Certified Public Accountants asked for additional guidance on "delivering into Texas." This language was in a current franchise tax rule concerning nexus and has not created a problem and is consistent with §171.001(b). Therefore, the comptroller declined to make any change.

The Texas Oil & Gas Association requested amending subsection (c)(4), (9), and (17) to exclude deliveries of items in Texas that remain in interstate commerce. The comptroller declined to make the suggested changes as the franchise tax provisions require that the tax be imposed to the limits of the U.S. Constitution. See Tax Code, §171.001(b).

The Section of Taxation of the State Bar of Texas stated that the list of activities which currently subjects an entity to franchise tax was changed. The list is a combination of the current nexus rules or a clarification to current nexus rules and, therefore, the comptroller did not make a change.

This new section is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §171.001 and §171.106.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

34 TAC §3.587

The Comptroller of Public Accounts adopts new §3.587, concerning margin: total revenue, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6284).

This section implements House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for determining total revenue under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) defines words and terms used in this section. Subsection (c) provides general rules used in the calculation of total revenue. Subsection (d) details the line items from federal income tax forms that each type of entity will use in determining total revenue and also details certain subtractions from total revenue. Subsection (e) details items that are excluded from total revenue.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Texas Medical Association (TMA) and the Texas Hospital Association (THA) recommended amending the calculation of the "cost of uncompensated care" in subsection (b)(1) by removing the subtraction of compensation from the calculation. The comptroller agreed to offer the amended calculation as one choice of two calculations; however, if the taxpayer uses the amended calculation for the "cost of uncompensated care", then the taxpayer must adjust the compensation deduction used to determine margin by the ratio used in calculating the "cost of uncompensated care".

The THA commented that the methodology used in subsection (b)(1) to determine the actual costs of uncompensated care is not consistent with how the costs of charity care are determined under generally accepted accounting principles for hospitals. The THA recommends the use of a cost-to-charge ratio simplified as total operating expenses divided by total gross charges applied to patient accounts classified as charity or bad debt. The comptroller declined to make this change as the formula provided in subsection (b)(1) is substantially comparable to THA's recommendation.

The State Bar of Texas, Section of Taxation (SBT) recommended adding language to subsection (b)(4) to provide that the determination of a taxable entity as a "health care provider" is made on a combined group basis. The comptroller declined to make this change because the determination of a taxable entity as a "health care provider" is made for each individual member of the combined group before combination.

1st Global recommended that subsection (b)(10) regarding the definition of "product" be stricken and/or redrafted in its entirety, as there is nothing in the statute to suggest that the legislature intended for the term "product" to mean "tangible personal property." The comptroller agreed and amended the definition in subsection (b)(10).

The Texas Society of Certified Public Accountants (TSCPA) recommended adding to subsection (b)(11)(B) a provision to include 1099 payments that do not meet the required amount. The comptroller had already included such a provision in the proposed rule.

The TMA and the THA recommended revising the definition of "uncompensated care" in subsection (b)(15) by removing the language that restricts "uncompensated care" to accounts where no payment has been received. The comptroller declined to make this change. Tax Code, §171.1011(n)(2) allows an exclusion for "uncompensated care", not under-compensated care.

SBT recommended adding language to subsection (c)(3) on federal consolidated groups to make it consistent with the language in §3.590 (d)(6) on determining combined taxable margin. The comptroller agreed and has amended subsection (c)(3).

The SBT and TSCPA recommended that subsection (c)(4) be rewritten to track the language of Tax Code, §171.1011(e) and to clarify that the income generated by a taxable entity with a passive entity owner will not be subject to multiple layers of tax. The comptroller declined to rewrite subsection (c)(4) to track the language of the statute as the current language clarifies the statute.

The SBT and TSCPA recommended that subsection (c)(5) be expanded to address timing differences in expense and revenue recognition and to include examples. The comptroller declined to expand subsection (c)(5). Timing difference issues will be addressed on a case-by-case basis.

The THA recommended that subsection (c)(5) regarding exclusions from revenue be amended to provide that this subsection does not apply to any revenues excluded by subsection (e)(11) regarding health care institutions. The comptroller declined to make this change as it is contrary to the statute. See Tax Code, §171.1011(j)

The comptroller has amended subsection (c)(5) concerning exclusions from revenue by replacing the word "revenue" with the word "amount" to make this paragraph consistent with the language in the statute.

The TSCPA recommended amending subsection (c)(6) to correct an error in the language. No such error was in the proposed rule.

The SBT recommended language to amend subsection (c)(7) regarding "affiliated groups" and "flow-through funds" to clarify what the SBT believes is the intent of this subsection. The comptroller declined to make this change as the proposed language is contrary to Tax Code, §171.1011(h). However, the comptroller has amended the heading of subsection (c)(7) to better identify the content of the paragraph.

The Texas Oil & Gas Association (TxOGA) and Copano Energy LLC requested clarification that subsection (c)(7) does not prohibit an intercompany elimination of the payment under Tax Code, §171.1014(c)(3) or §3.590(d)(1)(C). The comptroller has determined that this clarification is unnecessary. Eliminations under §3.590(d)(1)(C) will not be affected by subsection (c)(7).

The SBT, TSCPA, The Honorable Larry Phillips, and McGinnis, Lochridge & Kilgore, LLP recommended that subsection (c)(8) be amended to allow a "lower tier" entity to exclude from total revenue any revenue reported to an "upper tier" entity, when the "upper tier" entity includes the revenue from the "lower tier" entity in its calculation of taxable margin. The comptroller agreed and amended subsection (c)(8).

TxOGA and Copano Energy LLC recommended that subsection (c)(8) be deleted as it results in double-taxation of the same revenue. The comptroller declined to delete subsection (c)(8); however, this paragraph has been amended to eliminate the double-taxation of the same revenue.

TxOGA and Copano Energy LLC recommended that subsection (c)(10) be amended to follow federal treatment and not require that a single member limited liability company be treated as an entity for which total revenue must be calculated separately prior to combination. The comptroller has decided to eliminate subsection (c)(10). This issue is addressed in §3.590(d)(6).

The SBT recommended that subsections (d)(1)(B)(ii), (d)(2)(B)(ii), (d)(3)(B)(ii), (d)(4)(B)(ii), and (d)(5)(B)(ii) be amended to provide the same exclusion for foreign royalties and foreign dividends as was available under the earned surplus component of the former franchise tax and also to be consistent with the apportionment dividend exclusion contemplated by subsection (e)(8)(B)(i). The comptroller declined to make these changes as the proposed language is contrary to Tax Code, §171.1011. However, the comptroller has amended each clause to restate the statutory provision.

TxOGA recommended that subsection (e)(1) include examples of excludible taxes and/or additional criteria that taxpayers can use to determine when taxes are excludible. The comptroller declined. The determination of excludible taxes will be based on specific facts and circumstances.

1st Global recommended adding language to subsection (e)(1) to include, as an exclusion from total revenue, "flow-through funds" distributed to persons. The comptroller agreed and has amended subsection (e)(1) accordingly.

The SBT recommended adding language to subsection (e)(2) to include, as an exclusion from total revenue, flow-through funds distributed to persons. The comptroller agreed and has amended subsection (e)(2) accordingly.

Watkins Transportation commented that in subsection (e)(2) there is no clear provision in the revised franchise tax for companies in the trucking/transportation brokerage industry to deduct flow-through funds. The comptroller agrees that there is no provision for companies in the trucking/transportation brokerage industry to deduct flow-through funds; however, the comptroller declines to allow such deductions as to do so would be contrary to Tax Code, §171.1011(f) and (g).

1st Global requests further guidance be provided by the rule in regards to "flow-through funds" as the gross receipts number reported on the federal return line number that corresponds to the revised franchise tax report does not fully encompass the exclusions that are permitted by federal law for amounts that are effectively "flow-through funds" for federal tax purposes. The comptroller declined as the rule must follow the statute and not federal law. See Tax Code, §171.1011(c)(1)(a)(i) and (c)(2)(A)(i).

The Texas Motor Transportation Association, Inc. and Groendyke Transport recommended that the fuel surcharge collected by trucking companies and then paid to independent contractors be allowed an exclusion from revenue as a "flow-through fund". The comptroller declined to make this change as classifying a fuel surcharge as a "flow-through fund" is contrary to the statute. See Tax Code, §171.1011(f) and (g).

The SBT and the TSCPA recommended that subsection (e)(10)(A)(i) be amended to include "co-payments" and "indirect payments" from a third-party agent or administrator made under certain programs as items that a health care provider may exclude from total revenue. The comptroller declined to include "co-payments" as exclusions from total revenue because "co-payments" are made by the patient. The comptroller agreed to include payments made by a third-party agent or administrator as exclusions from total revenue and has amended subsection (e)(10)(A) accordingly.

The TMA recommended additional guidance on subsection (e)(10)(A) to clarify that revenues from the indicated programs' managed care plans are excludable from total revenue. The comptroller has agreed to clarify that revenue from any plans under the indicated programs is excludable from total revenue.

The TMA and the Kelsey-Seybold Clinic recommended additional guidance on subsection (e)(10)(A) to clarify that "co-payments", "deductibles" and "capitation payments" are also excludable from total revenue. The comptroller declined to make this clarification. The comptroller instead clarified that payments received from the patient, such as "co-payments", "deductibles" and "capitation payments", are not excludable from total revenue. See Tax Code, §171.1011(n)(1).

The Texas Association of Personnel Consultants raised a number of concerns regarding the disclosure of certain proprietary company information. Any changes to the rule would be contrary to statute. See Tax Code, §171.1011(k).

This new section is adopted under Tax Code, §111.002 and §111.022, which provides the comptroller with the authority to

prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This new section implements Tax Code, §171.1011.

§3.587. Margin: Total Revenue.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Actual costs of uncompensated care--the amount determined by either (A) or (B) of this paragraph where total charges means all amounts for health care services, including uncompensated care and compensation includes amounts determined under Tax Code, §171.1013, regardless of whether the taxable entity elects to subtract compensation. See §3.589 of this title (relating to Margin: Compensation).

(A) Uncompensated care divided by total charges multiplied by operating expenses. If this method is used to determine uncompensated care, a corresponding adjustment must be made in determining compensation by the ratio of uncompensated care divided by total charges.

(B) Uncompensated care divided by total charges multiplied by the result of total operating expenses less compensation.

(2) Federal obligations--

(A) stocks and other direct obligations of, and obligations unconditionally guaranteed by, the United States government and United States government agencies; and

(B) direct obligations of a United States government-sponsored agency.

(3) Health care institution--Any of the following types of institutions: an ambulatory surgical center; an assisted living facility licensed under Health and Safety Code, Chapter 247; an emergency medical services provider; a home and community support services agency; a hospice; a hospital; a hospital system; an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with the federal Social Security Act, §1915(c) (42 U.S.C. §1396n); a birthing center; a nursing home; an end stage renal disease facility licensed under Health and Safety Code, §251.011; or a pharmacy.

(4) Health care provider--Any taxable entity that participates in the Medicaid program, Medicare program, Children's Health Insurance Program (CHIP), state workers' compensation program, or TRICARE military health system as a provider of health care services.

(5) Lending institution--An entity that makes loans and;

(A) is regulated by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Office of Thrift Supervision, the Texas Department of Banking, the Office of Consumer Credit Commissioner, the Credit Union Department, or any comparable regulatory body;

(B) is licensed by, registered with, or otherwise regulated by the Department of Savings and Mortgage Lending;

(C) is a "broker" or "dealer" as defined by the Securities Exchange Act of 1934 at 15 U.S.C. §78c; or

(D) provides financing to unrelated parties solely for agricultural production.

(6) Management company--A corporation, limited liability company, or other limited liability entity that conducts all or part of the active trade or business of another entity ("the managed entity") in exchange for:

(A) a management fee; and

(B) reimbursement of specified costs incurred in the conduct of the active trade or business of the managed entity, including wages and cash compensation as determined under Tax Code, §171.1013(a) and (b).

(7) Net distributive income--The net amount of income, gain, deduction, or loss relating to a pass-through entity or disregarded entity reportable to the owners for the tax year of the entity.

(8) Obligation--Any bond, debenture, security, mortgage-backed security, pass-through certificate, or other evidence of indebtedness of the issuing entity. The term does not include a deposit, a repurchase agreement, a loan, a lease, a participation in a loan or pool of loans, a loan collateralized by an obligation of a United States government agency, or a loan guaranteed by a United States government agency.

(9) Pro bono services--The direct provision of legal services to the poor, without an expectation of compensation.

(10) Product--Services, tangible personal property, and intangible property.

(11) Sales commission--

(A) any form of compensation paid to a person for engaging in an act for which a license is required by Occupations Code, Chapter 1101; or

(B) compensation paid to a sales representative by a principal in an amount that is based on the amount or level of certain orders for or sales of the principal's product and that the principal is required to report on Internal Revenue Service Form 1099-MISC (or would have been reported if the amount had met the Internal Revenue Service minimum reporting requirement).

(C) for purposes of defining sales commission, a principal is a person who:

(i) manufactures, produces, imports, distributes, or acts as an independent agent for the distribution of a product for sale;

(ii) uses a sales representative to solicit orders for the product; and

(iii) compensates the sales representative wholly or partly by sales commission.

(12) Security--The meaning assigned by Internal Revenue Code, §475(c)(2), and includes instruments described by Internal Revenue Code, §475(e)(2)(B), (C), and (D).

(13) Staff leasing services company--A business entity that offers staff leasing services, as that term is defined by Labor Code, §91.001, or a temporary employment service, as that term is defined by Labor Code, §93.001.

(14) Tiered partnership arrangement--An ownership structure in which any of the interests in one taxable entity treated as a partnership or an S corporation for federal income tax purposes (a "lower tier entity") are owned by one or more other taxable entities (an "upper tier entity").

(15) Uncompensated care--Standard charges for the health care services provided by a health care provider, where the provider has not received any payment for health care provided to the patient.

(16) United States government--Any department or ministry of the federal government, including a federal reserve bank. The term does not include a state or local government, a commercial enterprise owned wholly or partly by the United States government, or a local governmental entity or commercial enterprise whose obligations are guaranteed by the United States government.

(17) United States government agency--An instrumentality of the United States government whose obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States government. The term includes the Government National Mortgage Association, the Department of Veterans Affairs, the Federal Housing Administration, the Farmers Home Administration, the Export-Import Bank, the Overseas Private Investment Corporation, the Commodity Credit Corporation, the Small Business Administration, and any successor agency.

(18) United States government-sponsored agency--An agency originally established or chartered by the United States government to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States government. The term includes the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Farm Credit System, the Federal Home Loan Bank System, the Student Loan Marketing Association, and any successor agency.

(c) General rules for reporting total revenue.

(1) Variant of form. Any reference to an Internal Revenue Service form includes a variant of the form. For example, a reference to Form 1120 includes Forms 1120-A, 1120-S, and other variants of Form 1120. A reference to an Internal Revenue Service form also includes any subsequent form with a different number or designation that substantially provides the same information as the original form.

(2) Amount reportable. Any reference to an amount reportable as income on a line number on an Internal Revenue Service form is the amount entered to the extent the amount entered complies with federal income tax law and includes the corresponding amount entered on a variant of the form, or a subsequent form, with a different line number to the extent the amount entered complies with federal income tax law.

(3) Federal consolidated group. A taxable entity that is part of a federal consolidated group or is a disregarded entity shall compute its total revenue as if it had filed a separate return for federal income tax purposes; provided, however, that a disregarded entity may combine its revenue, cost of goods sold, compensation and gross revenue with its parent as provided by §3.590(d)(6) of this title (relating to Margin: Combined Reporting). Further information on combined entities can be found in §3.590 of this title (relating to Margin: Combined Reporting).

(4) Passive entity. A taxable entity will include its share of net distributive income from a passive entity, but only to the extent the net income of the passive entity was not generated by any other taxable entity.

(5) Exclusions from total revenue. For any amount that is excluded from total revenue, the related costs may not be included in the determination of cost of goods sold (see §3.588 of this title (relating to Margin: Costs of Goods Sold)) or the determination of compensation (see §3.589 of this title (relating to Margin: Compensation)).

(6) Contract services. Except as provided by subsection (e)(2) of this section, a payment received under an ordinary contract for the provision of services in the ordinary course of business may not be excluded from the calculation of total revenue.

(7) Payment to affiliated group members. If the taxable entity belongs to an affiliated group, the taxable entity may not exclude from the calculation of total revenue any payments described by subsection (e)(1) - (6) of this section that are made to entities that are members of the affiliated group.

(8) Lower tier entities. A lower tier entity in a tiered partnership arrangement may exclude from total revenue any revenue reported to an upper tier entity subject to the following paragraphs:

(A) The lower tier entity must submit a report to the comptroller showing the amount of total revenue that each upper tier entity should include with the upper tier entity's own taxable margin calculation, according to the ownership interest of the upper tier entity.

(B) This paragraph does not apply to that percentage of the total revenue attributable to an upper tier entity by a lower tier entity if the upper tier entity is not subject to the tax under this chapter. In this case, the lower tier entity is liable for the tax on its taxable margin.

(C) The no tax due thresholds, discounts and the E-Z Computation do not apply to an upper tier entity if, before the attribution of any total revenue by a lower tier entity to an upper tier entity under this section, the lower tier entity does not meet the criteria. See §3.584(d)(6) of this title (relating to Margin: Reports and Payments).

(D) Total revenue reported from a lower tier entity to an upper tier entity under the provisions of Tax Code, §171.1015(b) is not a distribution from a partnership.

(9) Allocated revenue. Revenue that Texas cannot tax because the activities generating that item of revenue do not have sufficient unitary connection with the entity's other activities conducted in Texas under the United States Constitution is not included in total revenue.

(d) Reporting total revenue. The line items in this subsection refer to line items on the 2006 Internal Revenue Service forms. In computing total revenue for a subsequent report year, total revenue should be based on the equivalent line numbers from the corresponding federal report and computed based on the Internal Revenue Code of 1986 in effect for the federal tax year beginning on January 1, 2007.

(1) Corporations. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as a corporation for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 1c, Internal Revenue Service Form 1120;

(ii) the amounts reportable as income on lines 4 through 10, Internal Revenue Service Form 1120; and

(iii) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) allowable deductions from Internal Revenue Service Form 1120, Schedule C, to the extent the relating dividend income is included in total revenue;

(v) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(vi) other amounts authorized by subsection (e) of this section.

(2) S corporations. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as an S corporation for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 1c, Internal Revenue Service Form 1120S;

(ii) the amounts reportable as income on lines 4 and 5, Internal Revenue Service Form 1120S; and

(iii) the amounts reportable as income on lines 3a and 4 through 10, Internal Revenue Service Form 1120S, Schedule K;

(iv) the amounts reportable as income on line 17, Internal Revenue Service Form 8825;

(v) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(3) Partnerships. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as a partnership for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 1c, Internal Revenue Service Form 1065;

(ii) the amounts reportable as income on lines 4, 6, and 7, Internal Revenue Service Form 1065;

(iii) the amounts reportable as income on lines 3a and 5 through 11, Internal Revenue Service Form 1065, Schedule K;

(iv) the amounts reportable as income on line 17, Internal Revenue Service Form 8825;

(v) the amounts reportable as income on line 11, plus line 2 or line 45, Internal Revenue Service Form 1040, Schedule F; and

(vi) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(4) Trusts. For the purpose of computing its taxable margin, the total revenue of a taxable entity treated as a trust for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on lines 1, 2a, 3, 4, 7, and 8 of Internal Revenue Service Form 1041;

(ii) the amount reportable as income on lines 3, 4, 32, and 37 of Internal Revenue Service Form 1040, Schedule E; and

(iii) the amounts reportable as income on line 11, plus line 2 or line 45, Internal Revenue Service Form 1040, Schedule F; and

(iv) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(5) Single member limited liability company (LLC) filing as a sole proprietorship. For the purpose of computing its taxable margin, the total revenue of a taxable entity registered as a single member

limited liability company and filing as a sole proprietorship for federal income tax purposes is computed by:

(A) adding:

(i) the amount reportable as income on line 3 of Internal Revenue Service, Form 1040, Schedule C;

(ii) the amount reportable as income on line 17, Internal Revenue Service Form 4797, to the extent that it relates to the LLC;

(iii) ordinary income or loss from partnerships, S corporations, estates and trusts, Internal Revenue Service Form 1040, Schedule E, to the extent that it relates to the LLC;

(iv) the amount reportable as income on line 16 of Internal Revenue Service Form 1040, Schedule D, to the extent that it relates to the LLC;

(v) the amounts reportable as income on lines 3 and 4, Internal Revenue Service Form 1040, Schedule E, to the extent that it relates to the LLC;

(vi) the amounts reportable as income on line 11, plus line 2 or line 45, Internal Revenue Service Form 1040, Schedule F, to the extent that it relates to the LLC;

(vii) the amount reportable as income on line 6 of Internal Revenue Service Form 1040, Schedule C, that has not already been included in this subparagraph; and

(viii) any total revenue reported by a lower tier entity as includable in the taxable entity's total revenue under Tax Code, §171.1015(b); and

(B) subtracting, to the extent included in the calculation under subparagraph (A) of this paragraph:

(i) bad debt expensed for federal income tax purposes that corresponds to items of gross receipts included for the current reporting period or a past reporting period;

(ii) foreign royalties and foreign dividends, including amounts determined under Internal Revenue Code, §78 or §§951 - 964;

(iii) net distributive income from a taxable entity treated as a partnership or as an S corporation for federal income tax purposes, except as provided by subsection (c)(4) of this section;

(iv) items of income attributable to an entity that is a disregarded entity for federal income tax purposes; and

(v) other amounts authorized by subsection (e) of this section.

(6) Other taxable entities. For a taxable entity other than a taxable entity treated for federal income tax purposes as a corporation, S corporation, partnership, trust, or single member limited liability company filing as a sole proprietorship, the total revenue will be an amount determined in a manner substantially equivalent to the amount calculated for the entities listed in this subsection.

(e) Exclusions from total revenue. Except as otherwise provided in this section and only to the extent included in the calculation of total revenue under subsection (d)(1) - (6) of this section, the following items shall be excluded from total revenue:

(1) Flow-through funds mandated by law. Flow-through funds that are mandated by law or fiduciary duty to be distributed to other entities or persons, including taxes collected from a third party by the taxable entity and remitted by the taxable entity to a taxing authority;

(2) Flow-through funds mandated by contract. Flow-through funds that are mandated by contract to be distributed to other entities or persons, limited to:

(A) sales commissions, as that term is defined by subsection (b)(11) of this section, to non-employees, including split-fee real estate commissions;

(B) the tax basis as determined under the Internal Revenue Code of securities underwritten; and

(C) subcontracting payments handled by the taxable entity to provide services, labor, or materials in connection with the actual or proposed design, construction, remodeling, or repair of improvements on real property or the location of the boundaries of real property;

(3) Principal repayments. A taxable entity shall exclude the principal repayment of loans;

(4) Tax basis of securities and loans. A taxable entity shall exclude the tax basis, as determined under the Internal Revenue Code, of securities and loans sold;

(5) Legal services. A taxable entity that provides legal services shall exclude:

(A) the following flow-through funds that are mandated by law, contract, or fiduciary duty to be distributed to the claimant by the claimant's attorney or to other entities on behalf of a claimant by the claimant's attorney:

(i) damages due the claimant;

(ii) funds subject to a lien or other contractual obligation arising out of the representation, other than fees owed to the attorney;

(iii) funds subject to a subrogation interest or other third-party contractual claim; and

(iv) fees paid an attorney in the matter who is not a member, partner, shareholder, or employee of the taxable entity;

(B) reimbursement of the taxable entity's expenses incurred in prosecuting a claimant's matter that are specific to the matter and that are not general operating expenses; and

(C) regardless of whether it was included in the calculation of total revenue under subsection (d) of this section, $500 per pro bono services case handled by the attorney, but only if the attorney maintains records of the pro bono services for auditing purposes in accordance with the manner in which those services are reported to the State Bar of Texas;

(6) Pharmacy cooperative. A taxable entity that is a pharmacy cooperative shall exclude flow-through funds from rebates from pharmacy wholesalers that are distributed to the pharmacy cooperative's shareholders;

(7) Staff leasing services company. A taxable entity that is a staff leasing services company shall exclude payments received from a client company for wages, payroll taxes on those wages, employee benefits, and workers' compensation benefits for the assigned employees of the client company;

(8) Dividends and interest from federal obligations. A taxable entity shall exclude dividends and interest received from federal obligations;

(9) Management company. A taxable entity that is a management company shall exclude reimbursements of specified costs incurred in its conduct of the active trade or business of a managed entity, including wages and cash compensation as determined under Tax Code, §171.1013(a) and (b);

(10) Health care provider. A taxable entity that is a health care provider shall exclude:

(A) the total amount of payments received (not to include any co-payments or deductibles received from the patient):

(i) under the Medicaid program, Medicare program, Indigent Health Care and Treatment Act (Health and Safety Code, Chapter 61), and Children's Health Insurance Program (CHIP), including any plans under these programs;

(ii) for professional services provided in relation to a workers' compensation claim under Labor Code, Title 5;

(iii) for professional services provided to a beneficiary rendered under the TRICARE military health system, including any plans under this program;

(iv) from a third-party agent or administrator for revenue earned under clauses (i) - (iii) of this subparagraph; and

(B) the actual costs, regardless of whether it was included in the calculation of total revenue under subsection (d)(1) - (6) of this section, of uncompensated care provided, but only if the provider maintains records of the uncompensated care for auditing purposes and, if the provider later receives payment for all or part of that care, the provider adjusts the amount excluded for the tax year in which the payment is received.

(11) Health care institution. A health care provider that is a health care institution shall exclude 50% of the exclusion described in paragraph (10) of this subsection.

(12) Federal government and armed forces. A taxable entity shall exclude all revenue received that is directly derived from the operation of a facility that is:

(A) located on property owned or leased by the federal government; and

(B) managed or operated primarily to house members of the armed forces of the United States.

(13) Oil and gas. During the dates, certified by the comptroller, in which the monthly average closing price of West Texas Intermediate crude oil is below $40 per barrel and the average closing price of gas is below $5 per MMBtu, as recorded on the New York Mercantile Exchange (NYMEX), a taxable entity shall exclude total revenue received from oil or gas produced from:

(A) an oil well designated by the Railroad Commission of Texas or similar authority of another state whose production averages less than 10 barrels a day over a 90-day period; and

(B) a gas well designated by the Railroad Commission of Texas or similar authority of another state whose production averages less than 250 mcf a day over a 90-day period.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.588

The Comptroller of Public Accounts adopts new §3.588, concerning margin: cost of goods sold, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6288).

This section implements House Bill 3, 79th Legislature, Third Called Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for computing cost of goods sold under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) provides general rules for computing cost of goods sold. Subsection (d) details the direct costs includable in cost of goods sold. Subsection (e) details additional costs includable in cost of goods sold. Subsection (f) relates to indirect and administrative overhead costs includable in costs of goods sold. Subsection (g) details those costs not includable in cost of goods sold.

We received comments from various groups. Following is a summary of the comments received and the responses.

The State Bar of Texas, Section of Taxation (SBT), the Texas Taxpayers and Research Association, and the Texas Association of Builders recommended deleting language in subsection (b)(7) concerning the deduction for installation costs because they considered it more restrictive than the statutory definition of production. The comptroller declines to change the language, which clarifies that installation services performed after manufacturing or construction has concluded are not deductible as a cost of goods sold. The comptroller has, however, amended subsection (b)(7) to specifically identity installation costs during the construction process as a cost of goods sold.

The SBT recommended that subsection (c)(1) include language that would allow to be deducted as cost of goods sold an amount that would have been paid if the transaction had been entered into on an arm's length basis. The comptroller declined to include the proposed language as it is contrary to Tax Code, 171.1012(m). The statute does not allow for modification of the deduction.

The SBT and The Texas Society of Certified Public Accountants (TSCPA) recommended that Internal Revenue Code, §472, related to LIFO, be added to the referenced sections in subsection (c)(2). The comptroller agreed and amended subsection (c)(2) accordingly. The SBT recommended that subsection (c)(2) be modified to provide further clarity as to the operation of the taxable entity's election to either capitalize or expense costs. The comptroller agreed and amended subsection (c)(2) accordingly.

The comptroller has added subsection (c)(6) to clarify how to determine cost of goods sold for a mixed transaction.

The SBT recommended that subsection (c)(7) be amended to clarify that an entity may be considered the owner of goods for

purposes of the cost of goods sold deduction in certain situations in which the entity may not have ownership for all legal purposes. The comptroller declined to make this change as the language is not provided for in Tax Code, §171.1012(i).

The comptroller has amended subsection (c)(8) regarding rentals and leases to include a motor vehicle leasing company.

The SBT recommended that the comptroller provide regulatory guidance illustrating the interpretation of the term "direct" for cost of goods sold purposes in subsection (d). The comptroller determined that questions regarding "direct" costs will be more appropriately addressed on a case-by-case basis.

The TSCPA recommended allowing the additional depreciation deductions for bonus depreciation that were previously disallowed to be included as cost of goods sold in subsection (d)(6). The comptroller declined to include bonus depreciation as cost of goods sold as Tax Code, §171.1012(c)(6) does not allow it.

The Texas Oil & Gas Association requested that "total indirect or administrative overhead costs" in subsection (f) be defined to include costs that are excluded from cost of goods sold under subsection (g). The comptroller declined to make this change as Tax Code, §171.1012(f) explicitly excludes items in subsection (g) from being included as indirect or administrative overhead costs.

The SBT and the TSCPA recommended that subsection (g)(12) be amended to include a definition of "officer," and the definition should exclude a person who is both an officer and the sole employee of a taxable entity. The comptroller declined to make these changes. Facts and circumstances will determine who is an officer. An exclusion for a person who is both an officer and the sole employee is contrary to Tax Code, §171.1012(e)(12).

This new section is adopted under Tax Code, §111.002 and §111.022, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This new section implements Tax Code, §171.1012.

§3.588. Margin: Cost of Goods Sold.

(a) Effective Date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Arm's length--The standard of conduct under which entities that are not related parties and that have substantially equal bargaining power, each acting in its own interest, would negotiate or carry out a particular transaction.

(2) Computer program--A series of instructions that are coded for acceptance or use by a computer system and that are designed to permit the computer system to process data and provide results and information. The series of instructions may be contained in or on magnetic tapes, printed instructions, or other tangible or electronic media.

(3) Goods--Real or tangible personal property sold in the ordinary course of business of a taxable entity. "Goods" includes:

(A) the husbandry of animals;

(B) the growing and harvesting of crops;

(C) the severance of timber from realty.

(4) Heavy construction equipment--Self-propelled, self-powered, or pull-type equipment that weighs at least 3,000 pounds and is intended to be used for construction. The term does not include a motor vehicle required to be titled and registered.

(5) Lending institution--An entity that makes loans and:

(A) is regulated by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Office of Thrift Supervision, the Texas Department of Banking, the Office of Consumer Credit Commissioner, the Credit Union Department, or any comparable regulatory body;

(B) is licensed by, registered with, or otherwise regulated by the Department of Savings and Mortgage Lending;

(C) is a "broker" or "dealer" as defined by the Securities Exchange Act of 1934 at 15 U.S.C. §78c; or

(D) provides financing to unrelated parties solely for agricultural production.

(6) Principal business activity--The activity in which a taxable entity derives the largest percentage of its "total revenue".

(7) Production--Construction, manufacture, installation occurring during the manufacturing or construction process, development, mining, extraction, improvement, creation, raising, or growth.

(8) Related party--A person, corporation, or other entity, including an entity that is treated as a pass-through or disregarded entity for purposes of federal taxation, whether the person, corporation, or entity is subject to the tax under this chapter or not, in which one person, corporation, or entity, or set of related persons, corporations, or entities, directly or indirectly owns or controls a controlling interest in another entity.

(9) Tangible personal property--

(A) includes:

(i) personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner;

(ii) films, sound recordings, videotapes, live and prerecorded television and radio programs, books, and other similar property embodying words, ideas, concepts, images, or sound, without regard to the means or methods of distribution or the medium in which the property is embodied, for which, as costs are incurred in producing the property, it is intended or is reasonably likely that any medium in which the property is embodied will be mass-distributed by the creator or any one or more third parties in a form that is not substantially altered; and

(iii) a computer program, as defined in paragraph (2) of this subsection.

(B) does not include:

(i) intangible property or

(ii) services.

(10) Undocumented worker--A person who is not lawfully entitled to be present and employed in the United States.

(c) General rules for determining cost of goods sold.

(1) Affiliated entities. Notwithstanding any other provision of this section, a payment made by one member of an affiliated group to another member of that affiliated group not included in the

combined group may be subtracted as a cost of goods sold only if it is a transaction made at arm's length.

(2) Capitalization or expensing of certain costs. A taxable entity that is allowed a subtraction by this section for a cost of goods sold and that is subject to Internal Revenue Code, §§263A, 460, or 471 (including a taxable entity subject to §471 that elects to use LIFO under §472), may:

(A) Capitalize those costs in the same manner and to the same extent that the taxable entity capitalized those costs on its federal income tax return, except for those costs excluded under subsection (g) of this section, or in accordance with subsections (d), (e), and (f) of this section. A taxable entity that elects to capitalize costs on its first report due on or after January 1, 2008, may not include any costs incurred prior to the accounting period upon which the report is based.

(i) If the taxable entity elects to capitalize those costs, it must capitalize each cost allowed under this section that it capitalized on its federal income tax return.

(ii) If the taxable entity later elects to begin expensing those costs allowed under this section as a cost of goods sold, the entity may not deduct any cost in ending inventory from a previous report.

(B) Expense those costs, except for those costs excluded under subsection (g) of this section, or in accordance with subsections (d), (e), and (f) of this section.

(i) If the taxable entity elects to expense those costs allowed under this section as a cost of good sold, costs incurred before the first day of the period on which the report is based may not be subtracted as a cost of goods sold.

(ii) If the taxable entity later elects to begin capitalizing those costs allowed under this section as a cost of goods sold, costs expensed on a previous report and costs incurred prior to the accounting period upon which the report is based may not be capitalized.

(3) Exclusions from total revenue. Costs related to any amount excluded from total revenue (see §3.587 of this title (relating to Margin: Total Revenue)) may not be included in the determination of cost of goods sold. Costs related to an amount excluded from revenue must be determined on a reasonable basis.

(4) Film and broadcasting. A taxable entity whose principal business activity is film or television production or broadcasting or the sale of broadcast rights or the distribution of tangible personal property described by subsection (b)(9)(A)(ii) of this section, or any combination of these activities, and who elects to use cost of goods sold to determine margin, may include as cost of goods sold:

(A) the costs described in this section in relation to the property;

(B) depreciation, amortization, and other expenses directly related to the acquisition, production, or use of the property, including

(C) expenses for the right to broadcast or use the property.

(5) Lending institutions. Notwithstanding any other provision of this section, if the taxable entity is a lending institution that offers loans to the public and elects to subtract cost of goods sold, the entity may subtract as a cost of goods sold an amount equal to interest expense.

(A) This paragraph does not apply to entities primarily engaged in an activity described by category 5932 of the 1987 Standard Industrial Classification Manual published by the federal Office of Management and Budget.

(B) For purposes of this subsection, an entity engaged in lending to unrelated parties solely for agricultural production offers loans to the public.

(6) Mixed transactions. If a transaction contains elements of both a sale of tangible personal property and a service, a taxable entity may only subtract as cost of goods sold the costs otherwise allowed by this section in relation to the tangible personal property sold.

(7) Owner of goods. A taxable entity may make a subtraction under this section in relation to the cost of goods sold only if that entity owns the goods. The determination of whether a taxable entity is an owner is based on all of the facts and circumstances, including the various benefits and burdens of ownership vested with the taxable entity.

(A) A taxable entity furnishing labor or materials to a project for the construction, improvement, remodeling, repair, or industrial maintenance (as the term "maintenance" is defined in §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance)), of real property is considered to be an owner of the labor or materials and may include the costs, as allowed by this section, in the computation of goods sold.

(B) Solely for the purposes of this section, a taxable entity shall be treated as the owner of goods being manufactured or produced by the entity under a contract with the federal government, including any subcontracts that support a contract with the federal government, notwithstanding that the Federal Acquisition Regulations may require that title or risk of loss with respect to those goods be transferred to the federal government before the manufacture or production of those goods is complete.

(8) Rentals and leases. Notwithstanding any other provision of this section, the following taxable entities may subtract as cost of goods sold the costs otherwise allowed by this section in relation to tangible personal property that the entity rents or leases in the ordinary course of business of the entity:

(A) a motor vehicle rental company that remits a tax on gross receipts imposed under Tax Code, §152.026 or a motor vehicle leasing company;

(B) a heavy construction equipment rental or leasing company; and

(C) a railcar rolling stock rental or leasing company.

(9) Reporting methods. A taxable entity shall determine its cost of goods sold, except as otherwise provided by this section, in accordance with the methods used on the federal income tax return on which the report under this chapter is based. This subsection does not affect the type or category of cost of goods sold that may be subtracted under this section.

(10) Restaurants. Entities engaged in activities described in Major Group 58 of the Standard Industrial Classification Manual may deduct for cost of goods sold only those expenses allowed under subsections (d), (e) and (f) of this section, that relate to the production of food. Any costs related to both the production of food and to other activities must be allocated to production on a reasonable basis.

(d) Cost of goods sold. The cost of goods sold includes all direct costs of acquiring or producing the goods, including:

(1) labor costs including W-2 wages, IRS Form 1099 wages, temporary labor, payroll taxes and benefits;

(2) cost of materials that are an integral part of specific property produced;

(3) cost of materials that are consumed in the course of performing production activities;

(4) handling costs, including costs attributable to processing, assembling, repackaging, and inbound transportation;

(5) storage costs, including the costs of carrying, storing, or warehousing property;

(6) depreciation, depletion, and amortization, reported on the federal income tax return on which the report under this chapter is based, to the extent associated with and necessary for the production of goods, including recovery described by Internal Revenue Code, §197, and property described in Internal Revenue Code, §179;

(7) the cost of renting or leasing equipment, facilities, or real property used for the production of the goods, including pollution control equipment and intangible drilling and dry hole costs;

(8) the cost of repairing and maintaining equipment, facilities, or real property directly used for the production of the goods, including pollution control devices;

(9) costs attributable to research, experimental, engineering, and design activities directly related to the production of the goods, including all research or experimental expenditures described by Internal Revenue Code, §174;

(10) geological and geophysical costs incurred to identify and locate property that has the potential to produce minerals;

(11) taxes paid in relation to acquiring or producing any material, or taxes paid in relation to services that are a direct cost of production;

(12) the cost of producing or acquiring electricity sold; and

(13) a contribution to a partnership in which the taxable entity owns an interest that is used to fund activities, the costs of which would otherwise be treated as cost of goods sold of the partnership, but only to the extent that those costs are related to goods distributed to the contributing taxable entity as goods-in-kind in the ordinary course of production activities rather than being sold by the partnership.

(e) Additional costs. In addition to the amounts includable under subsection (d) of this section, the cost of goods sold includes the following costs in relation to the taxable entity's goods:

(1) deterioration of the goods;

(2) obsolescence of the goods;

(3) spoilage and abandonment, including the costs of rework, reclamation, and scrap;

(4) if the property is held for future production, preproduction direct costs allocable to the property, including storage and handling costs, as provided by subsection (d)(4) and (5) of this section;

(5) postproduction direct costs allocable to the property, including storage and handling costs, as provided by subsection (d)(4) and (5) of this section;

(6) the cost of insurance on a plant or a facility, machinery, equipment, or materials directly used in the production of the goods;

(7) the cost of insurance on the produced goods;

(8) the cost of utilities, including electricity, gas, and water, directly used in the production of the goods;

(9) the costs of quality control, including replacement of defective components pursuant to standard warranty policies, inspection directly allocable to the production of the goods, and repairs and maintenance of goods; and

(10) licensing or franchise costs, including fees incurred in securing the contractual right to use a trademark, corporate plan, manufacturing procedure, special recipe, or other similar right directly associated with the goods produced.

(f) Indirect or administrative overhead costs. A taxable entity may subtract as a cost of goods sold indirect or administrative overhead costs that it can demonstrate are allocable to the acquisition or production of goods. This amount may not exceed 4.0% of total indirect or administrative overhead cost.

(1) Indirect or administrative overhead costs include, but are not limited to, all mixed service costs, such as security services, legal services, data processing services, accounting services, personnel operations, and general financial planning and financial management costs.

(2) Any costs already subtracted under subsections (d) or (e) of this section, may not be subtracted under this subsection.

(3) Any costs excluded under subsection (g) of this section, may not be subtracted under this subsection.

(g) Costs not included. The cost of goods sold does not include the following costs in relation to the taxable entity's goods:

(1) the cost of renting or leasing equipment, facilities, or real property that is not used for the production of the goods;

(2) selling costs, including employee expenses related to sales;

(3) distribution costs, including outbound transportation costs;

(4) advertising costs;

(5) idle facility expenses;

(6) rehandling costs;

(7) bidding costs, which are the costs incurred in the solicitation of contracts ultimately awarded to the taxable entity;

(8) unsuccessful bidding costs, which are the costs incurred in the solicitation of contracts not awarded to the taxable entity;

(9) interest, including interest on debt incurred or continued during the production period to finance the production of the goods;

(10) income taxes, including local, state, federal, and foreign income taxes, and franchise taxes that are assessed on the taxable entity based on income;

(11) strike expenses, including costs associated with hiring employees to replace striking personnel, but not including the wages of the replacement personnel, costs of security, and legal fees associated with settling strikes;

(12) officers' compensation;

(13) costs of operation of a facility that is:

(A) located on property owned or leased by the federal government; and

(B) managed or operated primarily to house members of the armed forces of the United States;

(14) any compensation paid to an undocumented worker used for the production of goods; and

(15) costs funded by a partnership contribution, to the extent that the contributing taxable entity made the cost of goods sold deduction under subsection (d)(13) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.589

The Comptroller of Public Accounts adopts new §3.589, concerning margin: compensation, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6292).

This section implements House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for computing compensation under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) identifies general rules used in the calculation of compensation to be subtracted from revenue, including limitations thereon. Subsection (d) identifies items excluded from the calculation of compensation. Subsection (e) identifies benefits that can and cannot be used in the calculation of compensation. Subsection (f) identifies rules for the computation of compensation by staff leasing companies. Subsection (g) identifies rules for the computation of compensation by management companies. Subsection (h) identifies rules for the computation of compensation by a small employer that has not provided health care benefits to any of its employees in the calendar year preceding the beginning date of its reporting period.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Section of Taxation of the State Bar of Texas (SBT) asked for a definition of "active trade or business" for purposes of determining whether an entity is acting as a "management company" in subsection (b)(3). The comptroller believes that this needs to be determined on a case by case basis.

The Texas Restaurant Association, the Texas Nursery and Landscape Association, and the Texas Employers for Immigration Reform requested that the definition of "undocumented worker" in subsection (b)(8) be changed to refer to a person who is employed in violation of the employment eligibility laws of the United States. This recommendation is contrary to statute so the comptroller declined to make this change. Tax Code, §171.1013(c-1), defines "undocumented worker" as meaning "a person who is not lawfully entitled to be present and employed in the United States."

SBT requested that the rule be amended to allow as compensation amounts paid to officers, directors, owners, partners, and employees paid on a Form 1099 MISC in subsection (b)(9)(A). This proposed change is contrary to Tax Code, §171.1013(a) so the comptroller declined to make this change.

The Texas Society of Certified Public Accountants (TSCPA) and the SBT requested a clarification of the definition of "net distributive income" in subsection (b)(9)(B). The comptroller agreed and the rule was amended.

Groendyke Transport, Inc. and Texas Motor Transportation Association, Inc. commented that contract labor cannot be subtracted and may be taxed twice. The comptroller declined to make a change because there is no statutory support to allow contract labor to be subtracted. See Tax Code, §171.1013(a).

The Texas Hospital Association requested that subsection (d)(2) be amended to exclude any revenues excluded by Tax Code, §171.1011(o). This is contrary to Tax Code, §171.1011(j) so the comptroller declined to make this change.

The comptroller has amended subsection (d)(2) to clarify the determination of compensation related to amounts excluded from revenue.

SBT recommended that subsection (e)(2) be amended to allow a deduction with respect to the amounts listed therein if such amounts are allowed to be deducted for federal tax purposes. Tax Code, §171.1013, requires benefits meet three requirements: they must be deductible; they must be provided by the taxable entity; and there must be a benefit. The comptroller declined to modify this provision because these listed items do not meet all of the requirements.

The Texas Association of Personnel Consultants raised a number of concerns regarding the disclosure of certain proprietary company information. Any changes to the rule would be contrary to Tax Code, §171.1013(d) and (e).

This new section is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §171.1011 and §171.1013.

§3.589. Margin: Compensation.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Assigned employee--Has the meaning assigned by Labor Code, §91.001.

(2) Client company--

(A) a person that contracts with a license holder under Labor Code, Chapter 91, and is assigned employees by the license holder under that contract; or

(B) a client of a temporary employment service, as that term is defined by Labor Code, §93.001(2), to whom individuals are assigned for a purpose described by that subdivision.

(3) Management company--A corporation, limited liability company or other limited liability entity that conducts all or part of the active trade or business of another entity (the managed entity) in exchange for:

(A) a management fee; and

(B) reimbursement of specified costs incurred in the conduct of the active trade or business of the managed entity.

(4) Natural person--A human being or the estate of a human being. The term does not include a purely legal entity given recognition as the possessor of rights, privileges, or responsibilities, such as a corporation, limited liability company, partnership, or trust.

(5) Net distributive income--The net amount of income, gain, deduction, or loss relating to a pass-through entity or disregarded entity reportable to the owners for the tax year of the entity.

(6) Small employer--An entity defined in Insurance Code, §1501.002.

(7) Staff leasing services company--A business entity that offers staff leasing services as that term is defined by Labor Code, §91.001, or temporary employment service as that term is defined by Labor Code, §93.001.

(8) Undocumented worker--A person who is not lawfully entitled to be present and employed in the United States.

(9) Wages and cash compensation--

(A) the amount entered in the Medicare wages and tips box of Internal Revenue Service Form W-2 or any subsequent form with a different number or designation that substantially provides the same information;

(B) the amount of net distributive income, regardless of whether cash or property pertaining to such income is actually distributed, from one of the following entities to partners or owners during the accounting period but only if the person receiving the amount is a natural person:

(i) taxable entities treated as partnerships for federal income tax purposes;

(ii) limited liability companies and corporations treated as S corporations for federal income tax purposes; and

(iii) limited liability companies treated as sole proprietorships for federal income tax purposes;

(C) stock awards and stock options deducted for federal income tax purposes, to the extent not included in subparagraph (A) of this paragraph.

(c) Compensation. Subject to Tax Code, §171.1014, a taxable entity that elects to subtract compensation for the purpose of computing its taxable margin under Tax Code, §171.101, may subtract an amount equal to:

(1) subject to subsection (d) of this section, all wages and cash compensation paid by a taxable entity to its officers, directors, owners, partners and employees. The taxable entity cannot subtract more than $300,000, or the amount determined under Tax Code, §171.006, for any one person in wages and cash compensation it determines under Tax Code, §171.101. See §3.590 of this title (relating to Margin: Combined Reporting); and

(2) subject to subsection (e) of this section, the cost of all benefits the taxable entity provides to its officers, directors, owners, partners, and employees;

(d) Compensation - excluded items. Compensation does not include:

(1) payments to independent contractors on Forms 1099;

(2) exclusions from revenue. See §3.587 of this title (relating to Margin: Total Revenue). Compensation related to any amount excluded from total revenue may not be included in the determination of compensation. The compensation related to an amount excluded from revenue must be determined on a reasonable basis;

(3) an employer's share of payroll taxes;

(4) wages or cash compensation paid to an employee whose primary employment is directly associated with the operation of a facility that is located on property owned or leased by the federal government, and managed or operated primarily to house members of the armed forces of the United States. See §3.587 of this title; and

(5) wages or cash compensation paid to undocumented workers.

(e) Benefits. A taxable entity is allowed to subtract the cost of all benefits to the extent deductible for federal income tax purposes that it provides to its officers, directors, owners, partners, and employees.

(1) The term "benefits" includes employer contributions made to:

(A) employees' health savings accounts;

(B) health care (for example, this would include contributions to the cost of health insurance);

(C) retirement; and

(D) workers' compensation.

(2) The term "benefits" does not include the following:

(A) amounts included in the definition of wages and cash compensation;

(B) discounts on the price of the taxable entity's merchandise or services sold to the taxpayer's employees, officers, or directors, partners, or owners that are not available to other customers;

(C) payroll taxes. (For example, "payroll taxes" would include payments to state and federal unemployment compensation funds and payments under the Federal Insurance Contributions Act, Chapter 21 of Subtitle C of the Internal Revenue Code, §§3101 - 3128, the Railroad Retirement Tax Act, Chapter 22 of Subtitle C of the Internal Revenue Code, §§3201 - 3233); and

(D) working condition amounts provided so employees can perform their jobs. (Examples of working condition benefits include an employee's use of a company car for business, job-related education provided to an employee, and travel reimbursement.)

(3) The cost of benefits does not include the amount paid by an employee.

(f) Staff leasing companies. See §3.587 of this title.

(1) A staff leasing company cannot subtract the following payments for assigned employees:

(A) wages and cash compensation;

(B) payroll taxes; and

(C) employee benefits including workers' compensation.

(2) A client company can subtract the following amounts for assigned employees:

(A) wages and cash compensation; and

(B) benefits.

(3) A client company cannot subtract the following:

(A) an administrative fee; and

(B) other costs.

(4) A staff leasing company shall determine compensation only for the taxable entity's own employees who are not assigned employees.

(g) Management company. See §3.587 of this title.

(1) A taxable entity that is a management company may not include as wages and cash compensation any amounts reimbursed by a managed entity.

(2) A taxable entity that is a managed entity may subtract wages and cash compensation that are reimbursed to the management company.

(3) A management company shall determine compensation for only those wages and compensation payments that are not reimbursed by a managed entity.

(h) Small employers. This subsection applies to a taxable entity that is a small employer and that has not provided health care benefits to any of its employees in the calendar year preceding the beginning date of its reporting period. Subject to Tax Code, §171.1014, a taxable entity to which this subsection applies that elects to subtract compensation for the purpose of computing its taxable margin under Tax Code, §171.101, may subtract the following health care benefits:

(1) amounts as provided under subsection (c) of this section;

(2) for the first 12-month period on which margin is based and in which the taxable entity provides health care benefits to all of its employees, an additional amount equal to 50% of the cost of health care benefits provided to its employees for that period; and

(3) for the second 12-month period on which margin is based and in which the taxable entity provides health care benefits to all of its employees, an additional amount equal to 25% of the cost of health care benefits provided to its employees for that period.

(4) The term "provide" does not include amounts paid by the employee, officer, director, etc.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
General Counsel
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34 TAC §3.590

The Comptroller of Public Accounts adopts new §3.590, concerning margin: combined reporting, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6294).

This section implements House Bill 3, 79th Legislature, Third Called Special Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for combined reporting under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) provides for mandatory combined reporting. Subsection (d) provides general rules for determining combined taxable margin and apportionment. Subsection (e) provides general rules describing the reporting entity's responsibilities. Subsection (f) provides general rules for determining the accounting period of the combined group. Subsection (g) addresses the liability for tax, interest, and penalty of the combined group and its members. Subsection (h) provides general rules for the calculation of credits. Subsection (i) provides general rules for calculating the tax rate.

We received several comments from various groups. Following is a summary of the comments received and the responses.

Texas Society of Certified Public Accountants (TSCPA) requested that the comptroller clarify the computation of the payroll and property factor for purposes of the 80% test and to provide an example. An example has been added to subsection (b)(2)(A).

The Tax Section of the State Bar of Texas (SBT) recommends that we add a provision to subsection (b)(2)(D) that limits the application to entities that satisfy criteria for combined reporting. The comptroller agreed and modified this language.

TSCPA requested clarification of the example in subsection (b)(4)(B)(iv) where Corporation A holds a 70% interest in Partnership B that owns 60% of Limited Liability Company C and Corporation A owns 40% of Limited Liability Company C. The comptroller agreed and amended subsection (b)(4)(B)(iv) explaining that Corporation A will be treated as owning 100% controlling interest in Limited Liability Company C by taking into account Company A's direct and indirect ownership of Limited Liability Company C.

TSCPA requested clarification that an owner entity holding a controlling interest in the owned entity is deemed to own all of the owned entity's interest in the owned entity's subsidiary. The comptroller concurs that if Corporation A owns 60% of Corporation B and Corporation B owns 41% of Corporation C, A will be deemed to own 41% of Corporation C through B. Another example has been added to subsection (b)(4)(B)(v).

SBT recommends adding another example as follows: Corporation A owns 10% of Limited Liability Company C and 45% of Corporation B. Corporation B owns 90% of Limited Liability Company C. The recommended example has been added as subsection (b)(4)(B)(v).

TSCPA gave an example of where separate, unrelated individuals each owns a limited liability company (LLC) and those LLCs own an interest in a partnership. TSCPA asked whether this is an affiliated group. The comptroller determined that interests owned by separate, unrelated individuals will not be combined to determine if entities are affiliated. An example has been added

as subsection (b)(4)(B)(vi) and the definition of "affiliated group" in subsection (b)(1) was modified by deleting "or owners."

TSCPA and Texas Oil and Gas Association (TxOGA) recommend that subsection (b)(4)(C) be deleted. This provision is necessary to address extraordinary situations not contemplated by the statutes. See Tax Code, §171.0001(8).

TSCPA commented that there is a concern over the more than 50% test when there are options for computing the ownership test. Explanatory language was added to subsection (b)(4)(F) on how this would be handled.

SBT recommends that the language defining the selection of a "reporting entity" in subsection (b)(5) be clarified. The comptroller agreed and changes were made.

SBT recommends that subsection (b)(5)(C) be changed to "has the greatest amount of revenue apportioned to Texas during the first year that a combined report is required to be filed, applying the apportionment formula in Tax Code, §171.106." The comptroller declined to make this change as revenue will not be apportioned to Texas on a separate entity basis. Taxpayers will calculate Texas gross receipts after intercompany eliminations. See Tax Code, §171.1014.

SBT and TxOGA recommends that the last sentence of subsection (b)(6)(B) be removed. The comptroller declines to make this change. This provision merely gives notice to taxable entities the current state of the law. As noted in the comments, this presumption may be rebutted.

SBT, TSCPA, and TxOGA recommend that subsection (b)(6)(C) relating to "instant unity" be deleted. "Instant unity" is supported by U.S. Supreme Court decisions. Furthermore, the presumption of "instant unity" may be rebutted. Accordingly, no change was made.

The comptroller added clarification to subsection (b)(6)(C) regarding requirements for reports for acquired entities.

TSCPA recommends limiting access to records to the extent the records are relevant to any item reported on the report under subsection (e). The intent of this provision is to notify the reporting entity that it will be responsible for providing records for the combined group, including those that do not have nexus. Chapter 111 of the Texas Tax Code generally will control access to records.

The SBT and TSCPA recommended that we clarify calculations for the tax rate applicable to retail and wholesale trades for a combined group. This was added to subsection (i).

TxOGA requested that we limit the courts that the comptroller will consult for guidance on the determination of a "unity business." The comptroller declines to make such limitation because other jurisdictions may have relevant court decisions that give guidance in interpreting the U. S. Constitution. See Tax Code, §171.001.

This rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code §§171.0001, 171.0002, 171.002, 171.101, 171.1011, 171.1014, 171.1016, 171.103, 171.105, 171.1055, and 171.0021.

§3.590. Margin: Combined Reporting.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliated group--Entities in which a controlling interest is owned by a common owner, either corporate or noncorporate, or by one or more of the member entities.

(2) Combined group--Taxable entities that are part of an affiliated group engaged in a unitary business and that are required to file a combined group report under Tax Code, §171.1014.

(A) A combined group may not include a taxable entity that conducts business outside the United States if 80% or more of the taxable entity's property and payroll are assigned to locations outside the United States. If either the property factor or payroll factor is zero, the denominator is one. For example, if Corporation Z has no property, but does have payroll located entirely outside the United States, Corporation Z will not be included in the combined group. The combined group may not include a taxable entity that conducts business outside the United States and has no property or payroll if 80% or more of the taxable entity's gross receipts are assigned to locations outside the United States. See Tax Code, §171.1014.

(B) A combined group may not include an exempt entity.

(C) A combined group must include eligible entities even if those entities do not have nexus as described in §3.586 of this title (relating to Margin: Nexus).

(D) Eligible pass-through entities including partnerships, limited liability companies taxed as partnerships under federal law, limited liability companies that are disregarded under federal law and S corporations are included in a combined group.

(E) Insurance companies that pay gross premiums tax are not included in a combined group.

(F) Passive entities are not included in the combined group; however, the pro rata share of net income from a passive entity shall be included in total revenue to the extent it was not generated by the margin of another taxable entity.

(3) Combined group report--A report that includes the business of all members of the combined group.

(4) Controlling interest.

(A) Controlling interest means:

(i) for a corporation, either more than 50%, owned directly or indirectly, of the total combined voting power of all classes of stock of the corporation, or more than 50% owned directly or indirectly, of the beneficial ownership interest in the voting stock of the corporation;

(ii) for a partnership, association, trust or other entity other than a limited liability company, more than 50%, owned directly or indirectly, of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity;

(iii) for a limited liability company, either more than 50%, owned directly or indirectly, of the total membership interest of the limited liability company or more than 50%, owned directly or indirectly, of the beneficial ownership interest in the membership interest of the limited liability company.

(B) Examples are as follows:

(i) Corporation A owns 10% of Corporation C and 60% of Corporation B, which owns 41% of Corporation C. Corporation A has a controlling interest in Corporation B and a controlling interest in Corporation C of 51% of stock ownership because it has control of the stock owned by Corporation B.

(ii) Corporation A owns 10% of Limited Liability Company C and 15% of Corporation B, which owns 90% of Limited Liability Company C. Corporation A does not have controlling interest in Limited Liability Company C and does not have a controlling interest in Corporation B. Corporation B has a controlling interest in Limited Liability Company C.

(iii) Individual A owns 100% of 10 corporations, each of which owns 10% of Partnership B. Individual A has a controlling interest in each of the ten corporations and in Partnership B.

(iv) Corporation A holds a 70% interest in Partnership B that owns 60% of Limited Liability Company C. Corporation A owns the remaining 40% of Limited Liability Company C. Corporation A owns a controlling interest in Partnership B and, taking into account Company A's direct and indirect ownership of Limited Liability Company C, a 100% controlling interest in Limited Liability Company C.

(v) Corporation A owns 10% of Limited Liability Company C and 45% of Corporation B, which owns 90% of Limited Liability Company C. Corporation A would hold a 10% interest in Limited Liability Company C which would not constitute a controlling interest. Corporation B has a controlling interest in Limited Liability Company C.

(vi) Partnership P is owned by Limited Liability Company A, Limited Liability Company B and Limited Liability Company C. Three, unrelated individuals each wholly owns one of the limited liability companies. None of the limited liability companies owns more than 50% of Partnership P. There is no controlling interest.

(C) In addition to the foregoing tests, the comptroller may consider any other circumstance that tends to demonstrate that the more than 50% direct or indirect common ownership test was met or was not met.

(D) Membership in an affiliated group shall be treated as terminated in any year, or fraction thereof, in which the conditions listed in this paragraph are not met, except as follows:

(i) when an affiliate is sold, exchanged, or otherwise disposed of, the membership in an affiliated group shall not be terminated if the requirements of this paragraph are again met immediately after the sale, exchange, or disposition.

(ii) The comptroller may treat the affiliated group as remaining in place if the conditions of this paragraph are again met within a period not to exceed two years.

(E) Except as otherwise provided, an entity is owned when a controlling interest is directly held or the interest is constructively owned. An individual constructively owns stock that is owned by his or her spouse.

(F) If an entity is a member of more than one affiliated group, the entity is treated as a member of the affiliated group (or part thereof) with respect to which it has a unitary relationship. If the entity has a unitary relationship with more than one of those affiliated groups, it shall elect to be treated as a member of only one group. The election shall remain in effect until the unitary business relationship between the entity and the other members ceases, or unless revoked with approval of the comptroller.

(5) Reporting entity--The combined group's choice of an entity that is:

(A) the parent entity, if it is part of the unitary business, or

(B) the entity that:

(i) is included within the combined group;

(ii) is subject to Texas' taxing jurisdiction; and

(iii) has the greatest Texas business activity during the first period upon which the first report is based, as measured by the Texas receipts after eliminations for that period.

(6) Unitary business--A single economic enterprise that is made up of separate parts of a single entity or of a commonly controlled group of entities that are sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. In determining whether a unitary business exists, the comptroller shall consider any relevant factor, including:

(A) whether:

(i) activities of the group members are in the same general line, such as manufacturing, wholesaling, retailing of tangible personal property, transportation, or finance;

(ii) the activities of the group members are steps in a vertically structured enterprise or process, such as the steps involved in the production of natural resources, including exploration, mining, refining, and marketing; or

(iii) the members are functionally integrated through the exercise of strong centralized management, such as authority over purchasing, financing, product line, personnel, and marketing.

(B) Other factors. In addition, the comptroller may consider other factors that may be applicable, including guidelines in Supreme Court decisions that presume activities are unitary. All affiliated entities are presumed to be engaged in a unitary business.

(C) New entities. When a taxable entity acquires another entity, a presumption exists for finding a unitary relationship during the first reporting period. Any party may rebut such presumption by proving that the taxable entities were not unitary. If such presumption is rebutted, then the taxable entities shall not be considered unitary as of the date of acquisition. When a taxable entity forms another taxable entity, a unitary relationship exists as of the date of formation unless the business is not unitary on a longer term basis. An acquired entity is required to file a report for the period prior to acquisition.

(D) Non-arm's-length prices. Goods or services or both are supplied at non-arm's length prices between or among entities. Existence of arm's-length pricing between entities, however, does not indicate lack of unity.

(E) Existence of benefits from joint, shared or common activity. A discount, cost-saving or other benefit can be shown to result from joint purchases, leaseholds, or other forms of joint, shared or common activities between or among entities.

(F) Relationships of joint, shared or common activity to income-producing operations. In determining whether a joint, shared, or common activity is indicative of a unitary relationship, consideration shall be given to the nature and character of the basic operations of each entity. Such consideration shall include, but not be limited to, the entity's sources of supply, its goods or services produced or sold,

its labor force, and market to determine whether the joint, shared, or common activity is directly beneficial to, related to, or reasonably necessary to the income-producing activities of the unitary business.

(G) Holding entities. The tests for a unitary business established by this section apply in determining whether a holding entity is included or excluded from a unitary business.

(7) United States--The 50 states and the District of Columbia. It also includes the territorial waters of the United States and the seabed and subsoil of those submarine areas that are adjacent to the territorial waters of the United States and over which the United States has exclusive rights, in accordance with international law, with respect to the exploration for or exploitation of natural resources. It also includes the possessions and territories of the United States and the Commonwealth of Puerto Rico.

(c) Mandatory combined reporting. A combined group shall file a combined group report. A taxable entity that is not included in a combined report must file a separate report if it is doing business in Texas or is chartered or organized in Texas.

(d) Determination of combined taxable margin and apportionment.

(1) Combined total revenue. A combined group shall determine its total revenue by:

(A) determining the total revenue of each of its members as provided by Tax Code, §171.1011 (including §171.1011(h)) and §3.587 of this title (relating to Margin: Total Revenue) as if the member were an individual taxable entity without regard to the $300,000 limitation provided by Tax Code, §171.002(d)(2);

(B) adding the total revenues of the members determined under subparagraph (A) of this paragraph, together; and

(C) subtracting, to the extent included under Tax Code, §§171.1011(c)(1)(A), (c)(2)(A), or (c)(3), items of total revenue received from a member of the combined group.

(2) Combined cost of goods sold.

(A) A combined group that elects to subtract costs of goods sold shall determine that amount by:

(i) determining the cost of goods sold for each of its members as provided by Tax Code, §171.1012 and §3.588 of this title (relating to Margin: Cost of Goods Sold) as if the member were an individual taxable entity;

(ii) adding the amounts of cost of goods sold determined under clause (i) of this subparagraph, together; and

(iii) subtracting from the amount determined under clause (ii) of this subparagraph, any cost of goods sold amounts paid from one member of the combined group to another member of the combined group, but only to the extent the corresponding item of total revenue was subtracted under paragraph (1)(C) of this subsection.

(B) A member of a combined group may claim as cost of goods sold those costs that qualify under Tax Code, §171.1012, if the goods for which the costs are incurred are owned by another member of the combined group.

(3) Combined compensation. The combined group may not subtract in relation to a person, more than $300,000 or the amount determined under Tax Code, §171.006, per 12-month period on which margin is based. A combined group that elects to subtract compensation shall determine that amount by:

(A) determining the compensation for each of its members as provided by Tax Code, §171.1013 and §3.589 of this title (relating to Margin: Compensation), as if each member were an individual taxable entity;

(B) adding the amounts of compensation determined under subparagraph (A) of this paragraph, together; and

(C) subtracting from the amount determined under subparagraph (B) of this paragraph, any compensation amounts paid from one member of the combined group to another member of the combined group, but only to the extent the corresponding item of total revenue was subtracted under paragraph (1)(C) of this subsection.

(4) Combined groups are eligible to elect to use the 70% of revenue calculation pursuant to Tax Code, §171.101 or E-Z Computation pursuant to Tax Code, §171.1016. See §3.584 of this title (relating to Margin: Reports and Payments).

(5) Combined apportionment.

(A) The combined margin is generally apportioned in accordance with §3.591 of this title (relating to Margin: Apportionment).

(B) Except as provided in subparagraph (D) of this paragraph, gross receipts from business done in this state of taxable entities without nexus individually in Texas are excluded from the numerator. For example, sales of tangible personal property shipped into Texas by a member that does not have nexus individually are excluded from the numerator but are included in the denominator.

(C) For each member of the combined group that does not have nexus individually with this state for purpose of taxation, a combined group must, for information purposes only, include in a report filed under Tax Code, §171.201 or §171.202:

(i) the gross receipts computed under subparagraph (B) of this paragraph; and

(ii) the gross receipts computed under subparagraph (B) of this paragraph, that are subject to taxation in another state under a throwback law or regulation.

(D) Receipts derived from transactions between members of a combined group that are excluded under Tax Code, §171.1014(c)(3), may not be included in the numerator or denominator of the apportionment factor. However, the numerator of the apportionment factor will include certain sales of tangible personal property made to third party purchasers if the tangible personal property is ultimately delivered to a purchaser in Texas without substantial modification. See Tax Code, §171.1055(b). For example, drop shipments made from a Texas location to a Texas purchaser would be included in Texas receipts based on the amount billed to the third party purchaser if the seller is a member of the combined group and the seller does not have nexus.

(6) When reporting revenue, cost of goods sold, compensation and gross receipts for a disregarded entity, that information may be included with the parent; in that event, both entities are presumed to have nexus.

(e) Reporting entity.

(1) Responsibilities of the reporting entity.

(A) Access to records. In addition to the information required to be included in the combined group report, upon request of the comptroller, the reporting entity shall provide access to the tax, financial, and nonfinancial records of entities that do and do not have Texas nexus.

(B) Filing. The reporting entity shall file a combined group report on behalf of the combined group together with all reports and schedules required by the comptroller. Any elections required by the combined group are binding on all members of the group.

(C) Payment. The reporting entity shall timely remit to the comptroller the Texas franchise tax imposed on the combined group.

(D) Authority. The reporting entity may file refund claims, give waivers and execute agreements on behalf of the combined group. Any refund claim, waiver given, agreement or any document executed, shall be considered as having also been given or executed by each combined group member.

(2) Notices. Notices mailed to the reporting entity shall be deemed to have been mailed to each of the taxable entities in the combined group.

(3) Change in the reporting entity. The reporting entity shall change only when the entity (other than the parent) is no longer subject to Texas' jurisdiction to tax or the reporting entity is no longer a member of the combined group, at which time the combined group shall designate another entity that qualifies as its reporting entity and notify the comptroller of the designation.

(f) Accounting period of the combined group.

(1) The combined group's accounting period is determined as follows:

(A) if two or more members of a combined group file a federal consolidated return, the group's accounting period is the federal taxable period of the federal consolidated group;

(B) in all other instances, the accounting period is the federal taxable period of the reporting entity.

(2) Members with different accounting periods. If the federal taxable period of a member differs from the federal taxable period of the combined group, the reporting entity will determine the portion of that member's revenue, cost of goods sold, compensation, etc. to be included by preparing a separate income statement prepared from the books and records for the months included in the group's accounting period.

(g) Liability for the combined tax, penalty, and interest. The members of a combined group shall be jointly and severally liable for the combined tax reported on the combined report and any interest and penalty.

(h) Credits. Unless otherwise provided by law, credits generally may be applied against the combined tax liability of the combined group. See §3.594 of this title (relating to Margin: Temporary Credit for Business Loss Carryforwards), and §3.593 of this title (relating to Margin: Credits).

(i) For a combined group, the revenue from each retail and wholesale trade activity of each of the members of the combined group shall be aggregated for purposes of determining whether the combined group is engaged in retail or wholesale trade. The determination of whether a combined group is engaged in a retail or wholesale trade activity shall be made after eliminations.

(j) Tax rate. The determination of whether a combined group entity is eligible for a lower tax rate or to file a no tax due report under Tax Code, §§171.002, 171.0021, and 171.1016, shall be made for the combined group as a whole after eliminations. See §3.584 of this title (relating to Reports and Payments).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
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34 TAC §3.591

The Comptroller of Public Accounts adopts new §3.591, concerning margin: apportionment, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6297).

This section implements House Bill 3, 79th Legislature, Third Called Special Session, 2006, and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for the apportionment of the franchise tax. Subsection (a) provides that this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) gives the apportionment formula and provides for two exceptions to the apportionment formula. Subsection (d) provides general rules for reporting gross receipts. Subsection (e) provides the treatment of specific items of revenue in the computation of gross receipts. Subsection (f) provides guidance in the determination of gross receipts for natural gas production.

We received comments from various groups. Following is a summary of the comments received and the responses.

The Texas Society of Certified Public Accounts (TSCPA) recommended that subsection (b)(7) be amended to define the "legal domicile" of a limited liability company. The "legal domicile" of a limited liability company is defined in subsection (b)(7).

The TSCPA states that the proposed rule raises some ambiguity as to whether the revenues from security sales are to be determined on a "net" or "gross" basis and asks if the increase in the default percentage from 6.5% to 7.9% was intentional. Subsection (e)(16) states when a security may be reported at "gross". The increase from 6.5% to 7.9% was intentional and was based on the increase in the Texas population.

The State Bar of Texas, Section of Taxation (SBT) recommended adding language to subsection (e)(26) to clarify that the determination of where a service is performed is not limited to activities performed directly by a taxable entity. The comptroller declined to make these changes as the apportionment of receipts from the performance of a service has not changed and should continue to be sourced to the location where the service is performed. Questions regarding this topic will be more appropriately addressed in a case by case basis.

The comptroller corrected references in subsection (b)(4) and (e)(2).

This rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §§171.103, 171.1055, 171.106, and 171.1121.

§3.591. Margin: Apportionment.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Capital asset--Any asset, other than an investment, that is held for use in the production of income, and that is subject to depreciation, depletion or amortization.

(2) Commercial domicile--The principal place from which the trade or business of the entity is directed.

(3) Employee retirement plan--A plan or other arrangement that qualifies under Internal Revenue Code (IRC), §401(a), or that satisfies the requirement of IRC, §403, or a government plan described in IRC, §414(d).

(4) Gross receipts--The amount determined as total revenue under §3.587 of this title (relating to Margin: Total Revenue), except for a taxable entity taking a deduction for uncompensated care or pro bono services or an entity for which subsection (e)(16) of this section, applies.

(5) Internal Revenue Code--The Internal Revenue Code of 1986 in effect for a specified tax year as provided by Tax Code, §171.0001.

(6) Investment--Any non-cash asset that is not a capital asset.

(7) Legal domicile--The legal domicile of a corporation or limited liability company is its state of formation. The legal domicile of a partnership, trust, or joint venture is the principal place of business of the partnership, trust, or joint venture. The principal place of business of a partnership, trust, or joint venture is the location of its day-to-day operations. If the day-to-day operations are conducted equally or fairly evenly in more than one state, then the principal place of business is the commercial domicile.

(8) Location of payor--The legal domicile of the payor.

(9) Security--An instrument defined under Internal Revenue Code, §475(c)(2), and includes instruments described by §475(e)(2)(B), (C), and (D) of that code.

(10) Tax reporting period--The period upon which the tax is based under Tax Code, §171.1532 or §171.0011.

(11) Taxable entity--Any entity upon which tax is imposed under Tax Code, §171.0002(a) and not specifically excluded under Tax Code, §171.0002(b) or §171.0002(c). See also §3.581 of this title (relating to Taxable and Non-Taxable Entities).

(c) Apportionment formula. A taxable entity's margin is apportioned to this state to determine the amount of franchise tax due by multiplying the taxable entity's margin by a fraction, the numerator of which is the taxable entity's gross receipts from business done in this state and the denominator of which is the taxable entity's gross receipts from its entire business except as provided by this subsection.

(1) Taxable entities that have margin that is derived, directly or indirectly from the sale of services to or on behalf of a regulated investment company as defined by IRC, §851(a), should refer to Tax Code, §171.106(b), relating to the apportionment of gross receipts from services for regulated investment companies.

(2) Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan, as defined in subsection (b)(3) of this section, should refer to Tax Code, §171.106(c), relating to the apportionment of gross receipts from services for employee retirement plans.

(d) General rules for reporting gross receipts.

(1) A taxable entity that files an annual report must report gross receipts based on the business done by the taxable entity beginning with the day after the date upon which the previous report was based, and ending with the last accounting period ending date for federal income tax purposes ending in the calendar year before the calendar year in which the report is originally due. If the taxable entity has not filed a previous report and must file an annual report, see §3.595 of this title (relating to Margin: Transition Rule).

(2) A taxable entity that files an initial report must report gross receipts based on its activities commencing with the beginning date, as described in §3.584 of this title (relating to Margin: Reports and Payments), and ending on the last accounting period ending date for federal income tax purposes that is at least 60 days before the original due date of the initial report.

(3) Taxable entities that are members of an affiliated group that are part of a unitary business must file a combined franchise tax report. See §3.590 of this title (relating to Margin: Combined Reporting), for determining gross receipts for a combined report.

(4) When a taxable entity computes gross receipts for apportionment, the taxable entity is deemed to have elected to use the same methods that the taxable entity used in filing its federal income tax return.

(5) Any item of revenue that is excluded from total revenue under Texas law or United States law is excluded from gross receipts everywhere and gross receipts in Texas as provided by Tax Code, §171.1055(a). For example, any amount that is excluded from total revenue under the Internal Revenue Code, §78 or §§951 - 964, is excluded from gross receipts.

(6) A taxable entity that uses a 52 - 53 week accounting year end and that has an accounting year that ends during the first four days of January of the year in which the report is originally due may use the preceding December 31 as the date through which margin is computed.

(7) Any item of allocated revenue excluded under §3.587(c)(9) of this title (relating to Margin: Total Revenue) is excluded from Texas receipts and receipts everywhere.

(e) Treatment of specific items in the computation of gross receipts.

(1) Bad debt recoveries. Bad debt recoveries are gross receipts.

(2) Capital assets and investments. Except as provided by paragraph (16) of this subsection, net gains and losses from sales of investments and capital assets must be added to determine the total gross receipts from such transactions. If both Texas and out-of-state sales have occurred, then a separate calculation of net gains and losses on Texas sales must be made. If the combination of net gains and losses

results in a net loss, the taxable entity should net the loss against other receipts, but not below zero. In no instance shall the apportionment factor be greater than 1. Net gain on sales of intangibles held as capital assets or investments is apportioned to the location of the payor. Examples of intangibles include, but are not limited to, stocks, bonds, commodities, futures contracts, patents, copyrights, licenses, trademarks, franchises, goodwill, and general receivable rights.

(3) Computer software services and programs. Gross receipts from the sale of computer software services are apportioned to the location where the services are performed. Gross receipts from the sale of a computer program (as the term "computer program" is defined in §3.308 of this title (relating to Computers - Hardware, Software, Services and Sales)), are receipts from the sale of an intangible asset and are apportioned to the legal domicile of the payor.

(4) Condemnation. Revenues from condemnation that result from the taking of property are gross receipts that are apportioned based on the location of the property condemned.

(5) Debt forgiveness. If a creditor releases any part of a debt, then the amount that the creditor forgives is a gross receipt that is apportioned to the legal domicile of the creditor.

(6) Debt retirement. Revenues from the retirement of a taxable entity's own indebtedness, such as through the taxable entity's purchase of its own bonds at a discount, are gross receipts that are apportioned to the taxable entity's legal domicile. The indebtedness is treated as an investment in the determination of the amount of gross receipts.

(7) Deemed sales of assets under Internal Revenue Code, §338. Amounts that are deemed to have been received by the target taxable entity are treated as sales of assets by the target taxable entity, and are apportioned according to rules that otherwise apply to sales of such assets under Tax Code, Chapter 171, or this section. For the purposes of this paragraph, the purchaser of the target's stock is considered the purchaser of the assets.

(8) Dividends and/or interest.

(A) Dividends that are recognized as a reduction of the taxpayer's basis in stock of a taxable entity for federal income tax purposes are not gross receipts. Dividends that exceed the taxpayer's basis for federal income tax purposes that are recognized as a capital gain are treated as dividends for apportionment purposes.

(B) The following are excluded from Texas receipts and receipts everywhere:

(i) dividends from a subsidiary, associate, or affiliated taxable entity that does not transact a substantial portion of its business or regularly maintain a substantial portion of its assets in the United States;

(ii) schedule C special deductions that are excluded from total revenue;

(iii) dividends and/or interest on federal obligations that are excluded from total revenue;

(iv) interest that is exempt from federal income tax.

(C) Dividends and/or interest that are received from a corporation or other sources are apportioned to the legal domicile of the payor.

(D) Dividends and/or interest that are received from a national bank are apportioned to Texas if the bank's principal place of business is located in Texas. Dividends and/or interest that are received from a bank that is organized under the Texas Banking Code are apportioned to Texas.

(E) A banking corporation may exclude from its Texas gross receipts interest that is earned on federal funds and interest that is earned on securities that are sold under an agreement to repurchase and that are held in a correspondent bank that is domiciled in Texas, but the banking corporation must include the interest in its gross receipts everywhere.

(9) Exchanges of property. Exchanges of property are included in gross receipts to the extent that the exchange is recognized as a taxable transaction for federal income tax purposes. Such exchange must be included in receipts based on the gross exchange value, unless otherwise required under this section.

(10) Federal enclave. All revenues from a taxable entity's sales, services, leases, or other business activities that are transacted on a federal enclave that is located in Texas are Texas receipts, unless otherwise excepted by this section.

(11) Insurance proceeds.

(A) Business interruption insurance proceeds are gross receipts when the proceeds are intended to replace lost profits. Such receipts are apportioned to the legal domicile of the payor of the proceeds.

(B) Revenues from fire and casualty insurance proceeds are apportioned to the location of the damaged or destroyed property.

(12) Internet access fee. A fee that is charged to obtain access to the World Wide Web in Texas is a Texas gross receipt.

(13) Leases and subleases.

(A) Revenues from the lease or sublease (or rental or subrental) of real property are apportioned to the location of the property.

(B) Revenues from the lease or sublease (or rental or subrental) of tangible personal property are apportioned to the location of the property. If the property is used both inside and outside Texas, then lease payments are apportioned based on the number of days that the tangible personal property was used in Texas divided by the number of days that the tangible personal property was used everywhere. If the amount of revenue that is due under the lease is based on mileage, then the lease payments are apportioned based on the number of miles in Texas divided by the number of miles everywhere.

(C) If a lump sum is charged for leased or subleased (or rented or subrented) property that is located both inside and outside Texas, then the allocation of such revenue is based on the rental value of each item of property.

(D) Revenues from the lease or sublease (or rental or subrental) of a vessel that engages in commerce are apportioned to Texas based on the number of days that the vessel is engaged in commerce in Texas waters divided by the number of days that the vessel is engaged in commerce everywhere.

(E) If a lease, sublease, rental, or subrental of real property or tangible personal property is treated as a sale for federal income tax purposes, then the receipts from the transaction are apportioned in the same manner as a sale. Any portion of the payments that the contracting parties designate as interest is interest receipts.

(14) Litigation awards. Revenues that are realized from litigation awards are gross receipts that are apportioned to the legal domicile of the payor of the proceeds; however, if the litigation awards are intended to replace receipts for which another apportionment rule is provided in this section, then the apportionment must be made in accordance with that rule. For example, if a taxable entity sues a Delaware corporation to recover on a sale of goods delivered to a Texas location,

then a judgment for the amount of that sale would not convert the receipts from Texas receipts to Delaware receipts. See subsection (f) of this section, for the apportionment of receipts from judgments, compromises, or settlements that relate to natural gas production.

(15) Loan servicing of real property. Receipts from the servicing of loans secured by real property are apportioned to the location of the collateral real property that secures the loan being serviced.

(16) Loans and securities. If a loan or security is treated as inventory of the seller for federal income tax purposes, the gross proceeds of the sale of that loan or security are considered gross receipts.

(17) Membership or enrollment fees paid for access to benefits. Membership or enrollment fees paid for access to benefits should be considered gross receipts from the sale of an intangible asset and are apportioned to the legal domicile of the payor.

(18) Mixed transactions. If a transaction involves elements of both a sale of tangible personal property and a service, but no documentation exists to show separate charges for the sale and service elements, then the comptroller may determine the amounts that are allocable to each element based on fair values or on any available evidence.

(19) Net distributive income. The net distributive income from a passive entity that is included in total revenue is apportioned to the principal place of business of the passive entity.

(20) Newspapers or magazines. All advertising revenues of a newspaper or magazine, including those revenues derived from out-of-state advertisements, are apportioned to Texas based on the number of newspapers or magazines distributed in Texas. All other receipts must be apportioned in accordance with the apportionment rules otherwise set out in this section. For example, receipts from sales of newspapers or magazines are to be apportioned based on paragraph (30) of this subsection.

(21) Patents, copyrights, and other intangible rights.

(A) Receipts from the use of intangibles.

(i) Revenues from a patent royalty are included in Texas receipts to the extent that the patent is utilized in production, fabrication, manufacturing, or other processing in Texas.

(ii) Revenues from a copyright royalty are included in Texas receipts to the extent that the copyright is utilized in printing or other publication in Texas.

(iii) Revenues that the owner of a trademark, franchise, or license receives are included as Texas receipts to the extent the trademark, franchise or license is used in Texas.

(iv) Royalties from an affiliated taxable entity that does not transact a substantial portion of its business or regularly maintain a substantial portion of its assets in the United States are excluded from Texas receipts and receipts everywhere.

(B) Sales. Sales of intangibles are apportioned based on the location of payor.

(22) Radio/television. All advertising revenues of a radio or television station that broadcasts or transmits from a location in Texas constitute Texas receipts, even though some of the listening or viewing audiences are located outside Texas. All other receipts must be apportioned in accordance with the apportionment rules otherwise set out in this section.

(23) Real property. Revenues from the sale, lease, rental, sublease, or subrental of real property, including mineral interests, are apportioned to the location of the property. Royalties from mineral interests are considered revenue from real property.

(24) Sales taxes. State or local sales taxes that are imposed on the customer, but are collected by a seller are not gross receipts of the seller. However, discounts that a seller is allowed to take in remittance of the collected sales tax are gross receipts to the seller.

(25) Securities. Receipts from the sale of securities are apportioned based on the location of the payor. If securities are sold through an exchange, and the buyer cannot be identified, then 7.9% of the revenue is a Texas receipt.

(26) Services. Receipts from a service are apportioned to the location where the service is performed. If services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas.

(A) Taxable entities that have margin that is derived, directly or indirectly, from the sale of services to or on behalf of a regulated investment company should refer to Tax Code, §171.106(b), for information on apportionment of such margin.

(B) Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan as defined in subsection (b)(3) of this section, should refer to the Tax Code, §171.106(c), for information on apportionment of such margin.

(C) Receipts from services that a defense readjustment project performs in a defense economic readjustment zone are not Texas receipts.

(27) Services procurement. Revenues for the procurement of services are apportioned to the place where the service procurement is performed.

(28) Subsidies or grants. Proceeds of subsidies or grants that a taxable entity receives from a governmental agency are gross receipts, except when the funds are required to be expended dollar-for-dollar (i.e., passed through) to third parties on behalf of the agency. Receipts from a governmental subsidy or grant are apportioned in the same manner as the item to which the subsidy or grant was attributed. For example, if a taxable entity qualifies for a grant to conduct research for the government, then the receipts from that grant are receipts from a service and are apportioned to the location where the research is performed.

(29) Tangible personal property. Examples of transactions that involve the sale of tangible personal property and result in Texas receipts include, but are not limited to, the following:

(A) the sale of tangible personal property that is delivered in Texas to a purchaser. Delivery is complete upon transfer of possession or control of the property to the purchaser, an employee of the purchaser, or transportation vehicles that the purchaser leases or owns. FOB point, location of title passage, and other conditions of the sale are not relevant to the determination of Texas gross receipts;

(B) the sale of tangible personal property that is delivered in Texas to an employee or transportation agent of an out-of-state purchaser. A carrier is an employee or agent of the purchaser if the carrier is under the supervision and control of the purchaser with respect to the manner in which goods are transported;

(C) the sale and delivery in Texas of tangible personal property that is loaded into a barge, truck, airplane, vessel, tanker, or any other means of conveyance that the purchaser of the property leases and controls or owns. The sale of tangible personal property that is delivered in Texas to an independent contract carrier, common carrier, or freight forwarder that a purchaser of the property hires results only in gross receipts everywhere if the carrier transports or forwards the property to the purchaser outside this state;

(D) the sale of tangible personal property with delivery to a common carrier outside Texas, and shipment by that common carrier to a purchaser in Texas;

(E) the sale of oil or gas to an interstate pipeline company, with delivery in Texas;

(F) the sale of tangible personal property that is delivered in Texas to a warehouse or other storage facility that the purchaser owns or leases;

(G) the sale of tangible personal property that is delivered to and stored in a warehouse or other storage facility in Texas at the purchaser's request, as opposed to a necessary delay in transit, even though the property is subsequently shipped outside Texas;

(H) the drop shipment of tangible personal property in Texas. A drop shipment is a shipment of tangible personal property from a seller directly to a purchaser's customer, at the request of the purchaser, without passing through the hands of the purchaser. This results in Texas gross receipts for the seller and the purchaser;

(30) Telephone companies.

(A) Revenues from telephone calls that both originate and terminate in Texas are Texas receipts.

(B) Revenues from telephone calls that originate in Texas but terminate outside of Texas or that originate outside of Texas but terminate in Texas are excluded from Texas receipts.

(C) Revenues from telecommunication services other than those services in subparagraph (A) or (B) of this paragraph are Texas receipts if the services are performed in Texas. For example, a telephone company that provides a long distance carrier access to the telephone company's local exchange network in Texas is performing a service in Texas. Any fee that the telephone company charges the long distance carrier for access to the local exchange network in Texas is a Texas receipt regardless of whether the access is related to an interstate call. A fee that is charged to obtain access to a local exchange network in Texas and that is based on the duration of an interstate telephone call may be excluded from Texas receipts.

(31) Texas waters. Revenues from transactions that occur in Texas waters are Texas receipts. Texas waters are considered to extend to 10.359 statute miles, or nine nautical miles, from the Texas coastline.

(32) Transportation companies. Transportation companies must report Texas receipts from transportation services in intrastate commerce by:

(A) the inclusion of revenues that are derived from the transportation of goods or passengers in intrastate commerce within Texas; or

(B) the multiplication of total transportation receipts by total mileage in the transportation of goods and passengers that move in intrastate commerce within Texas divided by total mileage everywhere.

(f) Natural gas production.

(1) Revenues that a gas producer realizes from the contract price of gas that the gas producer produces and that the purchaser takes pursuant to the terms of sales are gross receipts and are apportioned to Texas, if the gas is delivered in Texas.

(2) Revenues that a gas producer realizes from a purchaser's payment under a sale or purchase contract for gas to be produced even if no gas is produced and delivered to the purchaser, are gross receipts and are apportioned to the legal domicile of the payor.

(3) Revenues that a gas producer realizes from a purchaser's payments to terminate a gas purchase contract are gross receipts and are apportioned to the legal domicile of the payor.

(4) Revenues that a gas producer realizes from a contract amendment that relates to the price of the gas sold are gross receipts from the sales of gas and are apportioned to Texas if delivery is made to a location in Texas. Revenues that the gas producer realizes from a contract amendment that relates to a provision other than the price of gas sold are gross receipts and are apportioned to the legal domicile of the payor.

(5) Revenues that a gas producer realizes from litigation awards for a breach of contract, reimbursements for litigation-related expenses (e.g., documented attorney's fees or court costs), or interest (upon which the parties have agreed, that the records of the producer reflects, or in an amount that a court has ordered) are gross receipts and are apportioned to the legal domicile of the payor.

(6) Revenues that a gas producer realizes from a judgment, compromise, or settlement relating to the recovery of a contract price of gas produced are gross receipts and are apportioned to Texas to the extent the contract specified delivery to a location in Texas. Revenues that a gas producer realizes from a judgment, compromise, or settlement that relates to several claims or causes of action shall be prorated based upon the documented amounts due under the contract for each claim or cause of action according to the records of the producer. For example, a settlement sum of $100,000 for a pricing dispute of $25,000 and for failure to pay for gas not taken in the amount of $225,000, would result in receipts of $10,000 from gas sales (100,000 X 25,000/250,000) and receipts from other business of $90,000 (100,000 X 225,000/250,000). Records of the producer shall include, but are not limited to the following: contracts, settlement agreements, accounting records and entries, court pleadings and worksheets, including calculations reflecting settlement amounts.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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34 TAC §3.592

The Comptroller of Public Accounts adopts new §3.592, concerning margin: additional tax, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6301).

This section implements House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for computing additional tax under Tax Code, Chapter 171. Subsection (a) provides the effective date. Subsection (b) provides the due date. Subsection (c) provides the tax rate and

period upon which the additional tax is based. Subsections (d) and (e) refer to other sections for more information.

We received comments from two groups. Following is a summary of the comments received and the responses.

The Texas Society of Certified Public Accountants asked for additional guidance on how a passive entity notifies the comptroller that the entity is no longer subject to the tax and, also, whether an entity that is part of a combined report should file a final report when it is no longer subject to the tax. The comptroller clarified subsections (d) and (e).

The Section of Taxation of the State Bar of Texas (SBT) asked for clarification as to when a foreign entity ceases to have nexus with Texas for a period of time. This issue has not been a problem in the past and the comptroller declined to make any changes. The SBT asked that the comptroller refer to a section of the Texas Tax Code regarding passive entities that had been repealed. The comptroller declined to make the change requested but clarified the reference in subsection (d). The SBT asked for clarification for members of a combined group. The comptroller made changes to subsection (e) to clarify.

This rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §171.0011.

§3.592. Margin: Additional Tax.

(a) Effective date. For reports originally due on or after January 1, 2008, the additional tax imposed by Tax Code, §171.0011, applies to a taxable entity which no longer has sufficient nexus with Texas to be subject to the franchise tax. All provisions of Tax Code, Chapter 171, apply to the additional tax, unless they conflict with a provision in Tax Code, §171.0011.

(b) Due date. A final report and payment of the additional tax are due within 60 days after the taxable entity no longer has sufficient nexus with Texas to be subject to the franchise tax. However, an estimated return and payment may need to be filed and paid before a taxable entity will receive clearance from the comptroller to terminate, dissolve, merge, or withdraw. As long as the proper amount is paid and an amended return, if needed, is filed within 60 days after the taxable entity terminates, dissolves, merges, or withdraws, then no penalty or interest will be assessed.

(c) Rate and business based on. The additional tax rate is determined by Tax Code, §171.002 and is applied to taxable margin for the period from the day after the last day for which tax under Tax Code, Chapter 171, was based on a previous report through the date the taxable entity no longer has sufficient nexus with Texas to be subject to the franchise tax.

(d) Passive entities. See §3.582(g) of this title (relating to Margin: Passive Entities) and Tax Code, §171.001(c). A passive entity must file a final report when the entity is no longer subject to the tax. If the entity has been a passive entity since the last report filed, no tax would be due with the report.

(e) Combined reports. See §3.590 of this title (relating to Margin: Combined Reporting). An entity that is part of a combined report must file a final report when the entity is no longer subject to the tax to tell the comptroller the name of the reporting entity. No financial data would be included on the report, unless the entity becoming no longer subject to the tax is the reporting entity.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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34 TAC §3.593

The Comptroller of Public Accounts adopts new §3.593, concerning margin: franchise tax credits, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6301).

This section implements House Bill 3, 79th Legislature, Third Called Special Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for the computation of franchise tax credits under Tax Code, Chapter 171. Subsection (a) provides that this section only applies to franchise tax reports originally due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) details the requirement that a credit schedule must be filed. Subsection (d) details the tax limitations for the credits. Subsection (e) details the carryforward and report limitation for the research and development credit. Subsection (f) details the carryforward and report limitation for the jobs creation credit. Subsection (g) details the installment, carryforward and report limitation for the investment credit. Subsection (h) relates to an investment credit for certain enterprise projects and details the calculation of the credit and the limitations.

We received two comments. Following is a summary of the comments received and the responses.

The Texas Society of Certified Public Accountants (TSCPA) recommended clarification of the tax limitations as they apply to a combined group. The comptroller agreed and added subsections (e)(3), (f)(3) and (g)(5) to provide that a combined group may take a credit for each member and that the tax limitations apply to the amount of tax due for the combined group.

The TSCPA commented that the definition of tangible personal property first placed in service in an enterprise zone does not address moveable property. Subsection (g)(4) was amended to clarify that a taxable entity is not eligible to take any additional installments if the property is moved outside the strategic investment area.

This rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, Chapter 171, Subchapter Q-1.

§3.593. Margin: Franchise Tax Credits.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise

(1) Research and development credit--A research and development credit established under Tax Code, Chapter 171, Subchapter O, on a franchise tax report originally due prior to January 1, 2008.

(2) Jobs creation credit--A jobs creation credit established under Tax Code, Chapter 171, Subchapter P, on a franchise tax report originally due prior to January 1, 2008.

(3) Investment credit--An investment credit established under Tax Code, Chapter 171, Subchapter Q, on a franchise tax report originally due prior to January 1, 2008 and an investment credit established under Tax Code, Chapter 171, Subchapter Q-1.

(4) Enterprise project--A person designated as an enterprise project under Government Code, Chapter 2303, on or after September 1, 2001, but before January 1, 2005.

(5) Enterprise zone--An area designated as an enterprise zone under Government Code, §2303.003.

(6) Qualified business--A person certified as a qualified business under Government Code, §2303.402.

(7) Qualified capital investment--Tangible personal property that is first placed in service in an enterprise zone by a qualified business that has been designated as an enterprise project and that is defined in IRS Reg. §1.48-1(c) and described in Internal Revenue Code, §1245(a), subject to depreciation or amortization including engines, machinery, tools, and implements that are used in a trade or business, or are held for investment. The term includes transportation costs and direct labor costs necessary to fabricate, install or place the tangible personal property in service. The term does not include real property or buildings and their structural components. Property that is leased under a capitalized lease is considered a "qualified capital investment," but property that is leased under an operating lease is not considered a "qualified capital investment." Property that is expensed under Internal Revenue Code, §179, is not considered a "qualified capital investment." The term also does not include all costs included in the depreciable basis such as indirect labor costs, interest, intangibles and overhead.

(8) Tangible personal property first placed in service in an enterprise zone includes tangible personal property that is:

(A) purchased by an enterprise project for placement in an incomplete improvement that is under active construction or other physical preparation;

(B) identified by a purchase order, invoice, billing, sales slip, or contract; and

(C) physically present at the enterprise project's qualified business site, as defined by Government Code, §2303.003, and in use by the enterprise project on the original due date of the report on which the credit is taken.

(c) Information required. A taxable entity that claims a credit under this section must submit a credit schedule with each report that a credit is claimed.

(d) Limitations.

(1) The total research and development credit, jobs creation and investment credits that a taxable entity claims may not exceed the amount of franchise tax due for the report after any other applicable credits.

(2) A taxable entity may not convey, assign, or transfer to another entity the credits that this section provides, unless all of the assets of the taxable entity are conveyed, assigned, or transferred to the entity in the same transaction.

(e) Research and development credit.

(1) Carryforward. If a taxable entity established a research and development credit on a franchise tax report originally due prior to January 1, 2008, that exceeded the tax limitations, then the taxable entity may continue to carry the unused credit forward on each consecutive report until the earlier of the date the credit would have expired under Tax Code, Chapter 171, Subchapter O, or December 31, 2027.

(2) Report limitation. The total research and development credit carryforward that a taxable entity may claim for a report may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(3) Combined group. A taxable entity that is a combined group may claim the unused credit carried forward for each member entity. The limitation in subsection (d) of this section and report limitation in paragraph (2) of this subsection shall be applied to the amount of franchise tax due of the combined group before any other tax credits are applied.

(f) Jobs creation credit.

(1) Carryforward. If a taxable entity established a jobs creation credit on a franchise tax report originally due prior to January 1, 2008, that exceeded the tax limitations, then the taxable entity may continue to carry the unused credit forward on each consecutive report until the earlier of the date the credit would have expired under Tax Code, Chapter 171, Subchapter P, or December 31, 2012.

(2) Report limitation. The total jobs creation credit carryforward that a taxable entity may claim for a report may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(3) Combined group. A taxable entity that is a combined group may claim the unused credit carried forward for each member entity. The limitation in subsection (d) of this section and report limitation in paragraph (2) of this subsection shall be applied to the amount of franchise tax due of the combined group before any other tax credits are applied.

(g) Investment credit.

(1) Installment. A taxable entity that has any unused installments from an investment credit established on a franchise tax report originally due prior to January 1, 2008, may claim the remaining installments on consecutive reports beginning with reports originally due on or after January 1, 2008.

(2) Carryforward. A carryforward is the remaining portion of an installment that cannot be claimed in the current year because of the limitations that are stated in subsection (d)(1) of this section or this paragraph. A carryforward is added to the next year's installment of the credit in determination of the limitations for that year. A credit carryforward from a previous report must be used before the current year installment. The taxable entity may carry the unused credit forward on each consecutive report until the earlier of the date the credit would have expired under Tax Code, Chapter 171, Subchapter Q, or December 31, 2012.

(3) Report limitation. The total investment credit that a taxable entity may claim for a report including any credit under subsection (h) of this section, may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(4) Ineligibility.

(A) A taxable entity may not take any remaining installment of the credit, (except the taxable entity is permitted to take the portion of an installment that accrued in a previous year and was carried forward pursuant to paragraph (2) of this subsection), if, during one of the periods used to determine margin for a report on which an installment could be claimed, the taxable entity:

(i) disposes of the qualified capital investment;

(ii) takes the qualified capital investment out of service;

(iii) moves the qualified capital investment out of the strategic investment area; or

(iv) fails to pay an average weekly wage, at the location for which the credit is claimed, that amounts to at least 110% of the county average weekly wage.

(B) For purposes of subparagraph (A)(i) - (iii) of this paragraph, an installment may still be taken if the qualified capital investment is replaced at the same location within 90 days with a new qualified capital investment of equal or greater value.

(5) Combined group. A taxable entity that is a combined group may claim any remaining installments and unused credit carried forward for each member entity. The limitation in subsection (d) of this section and report limitation in paragraph (3) of this subsection shall be applied to the amount of franchise tax due of the combined group before any other tax credits are applied.

(h) Enterprise projects. A taxable entity that has been designated an enterprise project on or after September 1, 2001, but before January 1, 2005, may establish a credit that equals 7.5% of the qualified capital investment made on or after January 1, 2005, and before January 1, 2007. Subject to paragraph (4) of this subsection, an enterprise project may claim the entire credit established on a report originally due on or after January 1, 2008, and before January 1, 2009.

(1) Carryforward. If an enterprise project is eligible for a credit that exceeds the limitation under paragraph (4) of this subsection, the enterprise project may carry the unused credit forward for not more than five consecutive reports.

(2) Ineligibility.

(A) An enterprise project is not eligible for a credit under this subsection if the enterprise project claimed a credit under Tax Code, Chapter 171, Subchapter Q, before the repeal of that subchapter on January 1, 2008.

(B) A taxable entity, other than a combined group, may not claim the credit under this subsection unless the taxable entity was, on May 1, 2006, subject to the tax imposed by this chapter as it existed on that date.

(C) A taxable entity that establishes its eligibility for an investment credit is not eligible to claim a franchise tax reduction that is authorized under Tax Code, §171.1015.

(3) Combined group. A taxable entity that is a combined group may claim the credit for each member entity that was, on May 1, 2006, subject to the tax imposed by this chapter as it existed on that date and shall compute the amount of the credit for that member as provided by this subsection.

(4) Report limitation. The total investment credit that a taxable entity claims for a report, including the amount of any installment or carryforward under subsection (g)(1) and (g)(2) of this section may not exceed 50% of the amount of franchise tax that is due for the report before any other tax credits are applied.

(5) Expiration. This subsection expires on December 31, 2009. This expiration does not affect the carryforward of a credit that was established on a report that was originally due before this expiration date.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706275
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2008
Proposal publication date: September 14, 2007
For further information, please call: (512) 475-0387

34 TAC §3.594

The Comptroller of Public Accounts adopts an amendment to §3.594, concerning margin: temporary credit for business loss carryforwards, with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6303).

This section is being amended to implement House Bill 3, 79th Legislature, Third Called Session 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This amendment establishes guidelines for calculating the temporary credit. Subsection (a) provides that this section only applies to franchise tax reports due on or after January 1, 2008. Subsection (b) defines words and terms used in the section. Subsection (c) identifies the entities eligible to take this credit and gives examples. Subsection (d) explains how to notify the comptroller of the credit amount preserved and informs taxpayers that any change to that amount can only occur due to state or federal audit results. Subsection (e) provides for the election of the credit on each report. Subsection (f) describes the calculation of the credit. Subsection (g) provides that the amount of credit claimed may not exceed the tax due on the report and how credits may be carried forward. Tax Code, §171.111(a) was amended to change the preservation date from September 1, 2007 to May 15, 2008. This amendment is found in new subsection (d)(1) of this section.

We received several comments on the changes to this rule from various groups. Following is a summary of the comments received and our responses.

The Section of Taxation of the State Bar of Texas (SBT) believes that the comptroller's position in subsection (b)(1) on the use of a business loss in a prior year to offset any positive amount of earned surplus is incorrect. No change was made to this subsection as it is the longstanding policy of this office that business losses must have been used to reduce any positive amount of earned surplus, after apportionment and allocation, to zero. See §3.555(g) of this title.

SBT had a concern about tying business losses to those created on the 2003 reports or thereafter in subsection (b)(2). The comp-

troller declined to make any changes as Tax Code, §171.110(e) provided for a 5 year carryforward for business losses. As a result, losses created on reports prior to 2003 would expire in 2007 and cannot be used.

SBT, Texas Taxpayers and Research Association (TTARA), Texas Society of Certified Public Accountants (TSCPA) and Scott, Douglass & McConnico LLP had concerns that the combined group application in subsection (c)(3) is overly broad particularly in regard to the addition of a new member of the group or a merger of a member into another member of the group. In addition, these groups had concerns about this section as it relates to the business loss carryforward of a member of a combined group that subsequently leaves the group. The proposed language is a correct interpretation of Tax Code, §171.1011(d) and no substantive changes have been made. However, an additional statement has been added to the subsection to further clarify the comptroller's position.

SBT questioned subsection (d)(1) which requires that a taxable entity preserve their right to claim the temporary credit on a form prescribed by the comptroller on or before May 15, 2008. A change was made to require that the preservation form be filed with the "taxable entity's first franchise tax report due after January 1, 2008."

The comptroller amended subsection (d)(3) to clarify that the amount preserved may be changed by the taxpayer after the initial preservation only as a result of an Internal Revenue Service audit.

The comptroller added subsection (d)(5) to clarify that no other changes to the amount preserved will be allowed except as a result of an Internal Revenue Service audit or an audit by the comptroller.

SBT and TSCPA believe that the comptroller's interpretation of the use of a business loss credit in subsection (e)(3) when the E-Z Computation is elected is incorrect. No substantive change was made as Tax Code, §171.1016(c) is clear in this circumstance; however, the comptroller clarified that in any report year in which the E-Z Computation is used, the credit for that year's report is lost and may not be carried over to subsequent years.

The comptroller has amended subsection (g) to require the use of a business loss credit to the extent there is any positive amount of tax due even if the calculated tax due is less than $1,000 and the entity ultimately will not owe any tax.

This rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.111.

§3.594. Margin: Temporary Credit for Business Loss Carryforwards.

(a) Provisions. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Business loss--Any negative amount of earned surplus after apportionment and allocation but before any deductions for solar energy devices under Tax Code, §171.107, clean coal project under Tax Code, §171.108, or investment in an enterprise zone under Tax Code, §171.1015. Business losses must have been used to offset any positive amount of earned surplus even in years when no tax was due.

(2) Business loss carryforward--Unused and unexpired amounts of business losses created on the 2003 and subsequent franchise tax report years.

(c) Eligibility.

(1) A taxable entity may claim the credit if the entity was, on May 1, 2006, subject to franchise tax.

(2) A taxable entity that is a combined group may claim the credit for each member entity that was, on May 1, 2006, subject to the franchise tax and shall compute the amount of the credit for that member as provided by this section.

(3) If a member of a combined group changes combined groups after June 30, 2007, the business loss carryforward of that member will no longer be included in the temporary credit calculation of the group and the related share of any temporary credit carried over from a previous year is lost to the group. There is no proration for a partial year. In addition, the business loss carryforward does not follow the member to a separately filed report or another combined group. If a member merges into another member of the group, that member's business loss carryforward will remain with the group. If the member dissolves, terminates, or otherwise leaves the group, the business loss carryover of that member is no longer eligible for use. If the combined group adds a new member or members, the credit of the existing members will remain intact, but no credit is allowed for the new member(s).

(4) Example. Corporation A, corporation B, corporation C and corporation D are members of a combined group. They have business loss carryforwards of $2,000,000, $2,000,000, $2,000,000, and $4,000,000 respectively. In 2008, the combined group's credit will be $10,000,000 x 2.25% x 4.5% equaling $10,125. The combined group's tax due before the credit is $9,000 which results in a carryover of $1,025. During 2008, corporation D leaves the group. On the 2009 report, the combined group is entitled to a credit of $6,000,000 x 2.25% x 4.5% equaling $5,075. In addition, the group only has $615 of the carryover credit. They lost the 40% that was related to corporation D. However, if corporation D had merged into corporation C during 2008 instead of leaving the group, the combined group's credit will remain $10,125 for 2009 and there will still be a $1,025 carryover from 2008.

(5) The preservation of the right to claim the credit may not be conveyed, assigned, or transferred to another entity.

(d) Notice requirements.

(1) A notice of intent to preserve the right to claim the temporary credit for business loss carryforwards must be submitted to the comptroller with the first report due from a taxable entity after January 1, 2008, on a form prescribed by the comptroller. The postmark date (or meter-mark date, if there is no postmark) on the envelope in which the form is received determines the date of filing.

(2) The taxable entity must submit with the notice of intent the amount of business loss that is being carried forward.

(3) After the initial preservation, the taxpayer may change the amount preserved only as the result of an Internal Revenue Service audit. The taxpayer must notify the comptroller in writing of the change within 120 days after the Internal Revenue Service audit is final.

(4) If, upon audit by the comptroller, an adjustment is made to the business loss carryforward used on reports prior to 2008, then no notice is required and the amount of business loss carryforwards that were preserved and subsequently taken will be adjusted accordingly. The taxable entity will be liable for any additional tax, penalty, and interest due for years in which the credit was improperly claimed.

(5) No other changes to the amount preserved will be allowed except as provided by subsections (d)(3) and (d)(4) of this section.

(e) Electing the credit. The election to claim the credit shall be made on each report originally due on or after January 1, 2008 and before September 1, 2027.

(1) A taxable entity elects the credit by:

(A) properly taking the credit on a report filed on or before the original due date; or

(B) electing the credit on a timely filed extension request and properly taking the credit on the report filed on or before the extended due date of the report.

(2) If an election to take the credit is not made on or before the original due date of the report as indicated in paragraph (1) of this subsection, the credit for that year is lost for that year and cannot be carried over to a subsequent year.

(3) A taxable entity that uses the E-Z Computation to report and pay its franchise tax may not elect to take the business loss carryforward credit in that year. See Tax Code, §171.1016(c). For any report year in which the E-Z Computation is used, the credit for that year's report is lost and may not be carried over to subsequent years.

(f) Computation of the credit.

(1) For report years 2008 - 2017: Business loss carryforward amount x 2.25% x 4.5%.

(2) For report years 2018-2027: Business loss carryforward amount x 7.75% x 4.5%.

(g) Credit carryover. The amount of credit claimed on any report may not exceed the amount of franchise tax due for that report year. A credit must be used to the extent that there is any positive amount of tax due even if the calculated tax due is less than $1,000 and the entity will not owe any tax. Unused credits may be carried over to subsequent report years unless subsection (e)(2) of this section applies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706305
Martin Cherry
General Counsel
Comptroller of Public Accounts
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Proposal publication date: September 14, 2007
For further information, please call: (512) 475-0387

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34 TAC §3.595

The Comptroller of Public Accounts adopts new §3.595, concerning margin: transition, without changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6305).

This section implements House Bill 3, 79th Legislature, Third Called Session, 2006 and House Bill 3928, 80th Legislature, 2007, which revise the franchise tax. This section establishes guidelines for computing tax liability during the transition period under Tax Code, Chapter 171. Subsection (a) states the effective date is as provided in the section. Subsection (b) provides guidance to entities previously subject to the franchise tax (e.g. corporations and limited liability companies, etc.). Subsection (c) provides guidance to newly taxable entities (e.g. limited partnerships, professional associations, etc.).

No comments were received regarding adoption of the new section.

This rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements House Bill 3, 79th Legislature, Third Called Session, 2006, Section 22 and House Bill 3928, 80th Legislature, 2007, Section 35.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706276
Martin Cherry
General Counsel
Comptroller of Public Accounts
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PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 81. INSURANCE

34 TAC §81.9

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code Chapter 81, Insurance, §81.9, without changes to the proposed text as published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7406), and will not be republished.

Section 81.9, concerning Grievance Procedure, is amended in order to make it conform with 34 TAC Chapter 67, concerning Hearings on Disputed Claims, which states that: (a) the definition of "Executive Director" includes her designee within the scope of the defined term; (b) the Board has statutory authority to delegate to the Executive Director its authority to decide appeals in ERS proceedings; and (c) the Executive Director has discretion to refer particular cases to the Board for final determination when appropriate. In addition, a reference to the TRICARE Supplement Plan in §81.9(a) has been removed due to recently passed federal legislation that prohibits offering an incentive for a participant to waive his employer health coverage in order to obtain TRICARE coverage.

No comments were received on the proposed rule.

The amendments are adopted under Texas Insurance Code, §1551.052 which provides authorization for the ERS Board of Trustees to adopt rules necessary to implement Texas Insurance

Code, Chapter 1551, and to carry out its purposes, and under Government Code §815.102 which provides authorization for the ERS Board of Trustees to adopt rules for hearings on contested cases or disputed claims.

No other statutes are affected by the adopted amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706292
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: December 31, 2007
Proposal publication date: October 19, 2007
For further information, please call: (512) 867-7421

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CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §85.1, §85.5

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code Chapter 85, Flexible Benefits, §85.1 and §85.5, without changes to the proposed text as published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7407) and will not be republished.

Sections 85.1 (Introduction and Definitions) and 85.5 (Benefits) are amended to define and direct the administration of the State of Texas Employees Flexible Benefit Program (TexFlex) and to clarify the rules. These sections are also being amended in order to comply with and conform to the provisions of the Internal Revenue Code, as amended, and Texas Insurance Code, Chapter 1551.

Section 85.1 amends the definition of Debit Card and also adds to the definition of Dependent.

Section 85.5, regarding the maximum benefit available, is amended by specifying that a participant classified as a nine month employee who receives compensation in fewer than 12 months shall redirect the annual election in nine equal installments of $555. If married and filing a separate income tax return, the participant shall redirect the annual election in nine equal installments of $277.

No comments were received regarding the amended sections.

The amendments are adopted under Texas Insurance Code §1551.052, which provides authorization for the ERS Board of Trustees to adopt rules necessary to implement Chapter 1551 and to carry out its purposes. No other statutes are affected by these adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706293
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: December 31, 2007
Proposal publication date: October 19, 2007
For further information, please call: (512) 867-7421

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CHAPTER 87. DEFERRED COMPENSATION

34 TAC §§87.1, 87.3, 87.5, 87.7, 87.9, 87.17, 87.19, 87.33

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code Chapter 87, Deferred Compensation, §§87.1, 87.3, 87.5, 87.7, 87.9, 87.17, 87.19, and 87.33, without changes to the text as published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7408) and will not be republished.

The amendments to §§87.1, 87.3, 87.5, 87.7, 87.9, 87.17, 87.19 and 87.33 are needed in order to update the Plan rules to clarify Plan requirements, and to comport with federal and state law and administrative requirements. The amendments allow for the maximum amount of deferrals permitted by tax law, while providing for the strict and careful monitoring of limits that may apply under such tax laws and Internal Revenue Service regulations.

Section 87.1, concerning Definitions, is amended to add certain definitions (Inherited IRA) and to exclude the University of Texas System as an eligible entity in the definition of State agency due to changes in state law. It also adds and revises certain definitions due to changes in state and federal law.

Sections 87.1, 87.3, 87.5, 87.7, 87.17 and 87.19 are amended to revise the term "agency coordinator" to "benefits coordinator" to conform with terminology used by ERS in other Programs.

Sections 87.3, 87.5 and 87.33 concerning Administrative and Miscellaneous Provisions and Participation by Employees, are amended to adjust the annual deferral limit to the amount allowed by the Internal Revenue Code without the requirement for future rule amendments.

Section 87.9, concerning Investment Products, is amended to include target date retirement funds as qualified investment products in the 457 Plan.

No comments were received regarding the amended sections.

These amendments are adopted under Government Code, §609.508, which provides authorization for the ERS Board of Trustees to adopt rules necessary to administer the deferred compensation plan.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2007.

TRD-200706294
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: December 31, 2007
Proposal publication date: October 19, 2007
For further information, please call: (512) 867-7421

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PART 6. TEXAS MUNICIPAL RETIREMENT SYSTEM

CHAPTER 123. ACTUARIAL TABLES AND BENEFIT REQUIREMENTS

34 TAC §123.7

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") adopts new rule 34 TAC §123.7, concerning the Board's authority to adopt changes to actuarial cost methods, assumptions, mortality tables and amortization periods. The new rule is adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8106) and will not be republished.

The purpose of the new rule is to implement the authority granted to the Board in House Bill 1244 (Act of June 15, 2007, 80th Legislature, Regular Session; adding subsection (c) to Texas Government Code §855.110) which granted the Board the authority to change amortization periods and to codify current Board practices with regard to other actuarial matters. The new rule enables the Board to address actuarial matters as needed for efficient administration of the system by adopting appropriate changes to actuarial cost methods, assumptions, mortality tables and amortization periods.

No comments were received regarding adoption of the new rule.

The new rule is adopted pursuant to Texas Government Code §855.102, which provides the Board with the authority to adopt rules necessary or desirable for the efficient administration of the system and pursuant to Texas Government Code §855.110, which authorizes the Board to adopt rules to change amortization periods.

Texas Government Code §855.407 is affected by the new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2007.

TRD-200706253
Eric Henry
Executive Director and Chief Investment Officer
Texas Municipal Retirement System
Effective date: January 1, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 225-3701

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34 TAC §123.8

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") adopts new rule 34 TAC §123.8, concerning changes to Updated Service Credit ("USC") calculations. The new rule is adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8106) and will not be republished.

The purpose of the new rule is to enable the Board to insure that a member's benefit calculation is reasonably related to a member's tenure and contributions. The new rule adjusts the method for calculation of the average updated service compensation used in the calculation of USC, by eliminating the highest and the lowest deposit from the calculation of the average updated service compensation and reducing the number of deposits used in the calculation from 36 to 34.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the authority granted to the Board in House Bill 1244 (Act of June 15, 2007, 80th Legislature, Regular Session; amending Texas Government Code §853.402) which granted the Board authority to adopt rules to limit the increase in a member's average updated service compensation from year to year.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2007.

TRD-200706254
Eric Henry
Executive Director and Chief Investment Officer
Texas Municipal Retirement System
Effective date: January 1, 2008
Proposal publication date: November 9, 2007
For further information, please call: (512) 225-3701

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CHAPTER 125. ACTIONS OF PARTICIPATING MUNICIPALITIES

34 TAC §125.7

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") adopts new rule 34 TAC §125.7, concerning optional additional contributions by municipalities. The new rule is adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8107) and will not be republished.

The purpose of the new rule is to increase the funding options available to participating municipalities and to encourage improved funding of an individual municipality's accrued unfunded actuarial liabilities. The new rule allows a participating municipality to make extra contributions to TMRS in excess of its required contributions.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the authority granted to the Board in House Bill 1244 (Act of June 15, 2007, 80th Legislature, Regular Session; to be codified at Texas Government Code §855.4065) which grants the Board the authority to adopt rules to allow municipalities to make additional contributions to TMRS.

Texas Government Code §855.407 and §855.501 are affected by the new rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 225-3701

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CHAPTER 127. MISCELLANEOUS RULES

34 TAC §127.9

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") adopts new rule 34 TAC §127.9, concerning authorization for certain payments in accordance with the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280. The new rule is adopted without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8107) and will not be republished.

The purpose of the new rule is to ensure that distributions from TMRS will be in accordance with applicable federal income tax law. The rule authorizes TMRS to make payments in accordance with §845 of the PPA, which permits certain public safety retirees to direct pension plan payments directly to an insurance carrier for health or long-term care premiums to obtain federal income tax benefits.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the authority granted to the Board in House Bill 1244 (Act of June 15, 2007, 80th Legislature, Regular Session; to be codified at Texas Government Code §851.006), which authorizes the Board to adopt rules to allow certain public safety retirees to direct pension plan payments directly to an insurance provider for qualified health or long-term care premiums to obtain federal income tax benefits.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Eric Henry
Executive Director and Chief Investment Officer
Texas Municipal Retirement System
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For further information, please call: (512) 225-3701

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety adopts amendments to Chapter 4, Subchapter A, §4.1, concerning Regulations Governing Hazardous Materials, without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8108).

Adoption of amendments to §4.1 is necessary in order to ensure that the Federal Hazardous Material Regulations, incorporated by reference in this section, reflect all amendments and interpretations issued through October 1, 2007.

On November 16, 2007, the department held a public hearing to receive comments from all interested persons regarding adoption of the amendments. No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.018, which authorizes the director to adopt all or part of the federal hazardous materials rules by reference; and Texas Transportation Code, §644.051, which authorizes the director to adopt all or part of the federal safety regulations by reference.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2007.

TRD-200706345
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §4.11, §4.13

The Texas Department of Public Safety adopts amendments to Chapter 4, Subchapter B, §4.11 and §4.13, concerning Regulations Governing Transportation Safety, without changes to the proposed text as published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8110).

Adoption of the amendments to §4.11 is necessary in order to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in the section, reflect all amendments and interpretations issued through October 1, 2007. Adoption of an additional amendment to the section is necessary in order to provide a definition for the term "off-road motorized construction equipment."

Adoption of amendments to §4.13 is necessary in order to implement the changes in municipality population thresholds that determine eligibility for certification to conduct commercial vehicle inspections that are contained in House Bills 1638 and 2077 and Senate Bill 545, as passed by the 80th Texas Legislature (2007). Adoption of additional amendments to the section is necessary in order to clarify the requirements for obtaining and maintaining certification to perform inspections on vehicles transporting hazardous materials in other bulk packaging.

On November 16, 2007, the department held a public hearing to receive comments from all interested persons regarding adoption of the amendments. No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 3. PUBLIC INFORMATION
SUBCHAPTER B. ACCESS TO OFFICIAL RECORDS

43 TAC §3.13

The Texas Department of Transportation adopts amendments to §3.13, Costs of Copies for Official Records. The amendments to §3.13 are adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7231) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 766, 80th Legislature, Regular Session, 2007, transfers the collection and analysis of accident records from the Department of Public Safety to the Texas Department of Transportation (department) effective October 1, 2007. Amendments to existing §3.13 are designed to implement legislation affecting the accident record process and facilitate the transfer of the accident records function to the department.

Section 3.13, Cost of Copies of Official Records, is amended to include the cost for accident records. The statute provides that the department may charge the lesser of the cost of producing the accident report or $6. The department has determined by calculating the cost of employee time, necessary equipment, and office supplies that the cost to provide an accident report exceeds $6, therefore the rule sets the price of the accident report at $6 as required by Transportation Code, §550.065. The cost for a certified copy of an accident report is set at $8 as established in Transportation Code, §550.065.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of work within the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §550.065.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200706364
Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 5. FINANCE
SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

43 TAC §§5.53 - 5.56, 5.58

The Texas Department of Transportation (department) adopts amendments to §5.53, Proposal, §5.54, Commission Approval to Negotiate, §5.55, Proposals from Private Entities, §5.56, Final Approval, and §5.58, Project Development by Public or Private Entity. The amendments to §§5.53 - 5.56, and §5.58 are adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7233) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The amendments clarify provisions of Transportation Code, §222.104 and implement new Transportation Code, §§222.105, 222.106, and 222.107, as added by Senate Bill 1266, 80th Texas Legislature, 2007. Those newly enacted sections provide that a municipality or a county may designate a contiguous geographic area in its jurisdiction as a transportation reinvestment zone to promote transportation projects in the area as pass-through projects financed as described in Transportation Code, §222.104 under a pass-through agreement. The amendments provide that the creation of such a transportation

reinvestment zone is considered by the department in determining the viability of a project proposed by a public entity and whether to enter into a pass-through agreement with a public entity. The amendments also clarify the other criteria that the department may consider when evaluating a proposal from a private entity.

Additionally, the amendments make grammatical and other nonsubstantive changes and renumber existing provisions.

Amendments to §5.53(a), Proposal, prescribe additional materials and information that must be included in a proposal submitted to the department for a proposed pass-through project under Transportation Code, §222.104, and clarify existing proposal requirements. The additional information required includes a statement of a proposing public entity's intentions with regard to the creation of a transportation reinvestment zone under Transportation Code, §222.106 or §222.107. The amendments will ensure that the department has the information necessary to determine the viability and potential public benefit of a proposed pass-through project. The amendments also make nonsubstantive changes, such as adding headings to each subsection of §5.53, to clarify the requirements of the section and to conform the section to other sections within the subchapter.

Amendments to §5.54, Commission Approval to Negotiate, add to the list of factors that the commission considers when determining whether to authorize the executive director to negotiate a pass-through agreement with a public entity whether a public entity proposer has or intends to designate a transportation reinvestment zone under Transportation Code, §222.106 or §222.107. Because funds generated by a transportation reinvestment zone may only be used to fund pass-through projects, the creation of a transportation reinvestment zone is indicative of a public entity's ability to make payments under a pass-through agreement, the presence of local support for a pass-through project, and, thus, the likelihood of success of the project.

Amendments to §5.55(c) clarify that the department may prescribe in a request for competing proposals to private entities additional evaluation criteria as the department deems necessary. This amendment will ensure that the department may tailor evaluation criteria to a specific project. Amendments to §5.55(g) and (h) clarify that the executive director directs the negotiation of pass-through agreements to provide consistency within the subchapter.

Amendments to §5.56(b), Contents of pass-through agreement, prescribe additional items that must be included in a pass-through agreement, including deadlines for key stages of project development, provisions for termination of the agreement, and, for a public entity, a copy of the document designating a transportation reinvestment zone as authorized under Transportation Code, §222.106 or §222.107, if such a designation has been made. The amendments will ensure that a pass-through agreement entered into by the department will serve the public interest, further local, regional, and state transportation goals, provide assurance that the project will be completed, and prudently provide for the expenditure of public funds.

Amendments to §5.58(c)(2) prescribe additional requirements with which highway projects constructed under a pass-through agreement must comply to ensure that highway projects constructed under a pass-through agreement meet all department standards for highway design and construction in order to ensure the safety of the traveling public. The amendments to paragraphs (7) and (11) of §5.58(c) clarify that final design plans and related documentation must be sent to the department. The amendments to paragraph (9) of §5.58(c) provide that revisions to any construction contract entered into under a pass-through agreement must comply with all department criteria and manuals and be submitted to the department. The amendments also make changes to provide consistency in terminology used throughout the subchapter.

COMMENTS

Two comments on the proposed amendments were received.

Comment:

The commenter stated: "Proposed 5.54(11) - as written this speaks to whether 'the entity' has or intends to designate a TRZ, if the proposer is a public entity. This ignores that the proposer may be a public entity which cannot, itself, establish a TRZ (such as an RMA), but can work in cooperation with another public entity that can create a TRZ (which is anticipated by the legislation)." The commenter suggested the following language for proposed §5.54(11):

(11) whether the proposer, or a governmental entity working in cooperation with the proposer, has or intends to designate a contiguous geographic area in the jurisdiction of the entity as a transportation reinvestment zone under Transportation Code, Chapter 222, Subchapter E.

Response:

The term "entity" relates to either a public or private entity and is inclusive of all components constituting the entity or team submitting the pass-through toll proposal. No change to the rule was made as a result of this comment.

Comment:

The commenter stated: "Proposed 5.56(13) - as written, this may reflect an assumption that a transportation reinvestment zone would already have been created at the time of final approval of the pass-through. In fact, that process may not have been completed at the time the pass-through is ready for final approval, and creating the zone should not be a condition of final approval of the pass-through financing." The commenter suggested the following language for proposed §5.56(b)(13):

(13) if applicable, a timeline showing when the process for creating a reinvestment zone under Transportation Code, Chapter 222, Subchapter E, is anticipated to be completed or, if already completed, a copy of the order, resolution, or ordinance designating a transportation reinvestment zone.

Response:

Proposed §5.56(b)(13) requires that a copy of any formally adopted order, resolution, or ordinance designating a transportation reinvestment zone be attached to a pass-through agreement being executed by the department and the public or private entity. Because a transportation reinvestment zone would be an integral aspect of project financing, it is vital that the department have proof that the order, resolution, or ordinance establishing it has been formally adopted before the agreement is executed. No change to the rule was made as a result of this comment.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission

(commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.104, which provides that the commission may adopt rules to implement the pass-through toll program.

CROSS REFERENCE TO STATUTE

Transportation Code, §§222.104, 222.105, 222.106, and 222.107.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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CHAPTER 8. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

43 TAC §§8.132, 8.133, 8.139, 8.144, 8.149

The Texas Department of Transportation (department) adopts amendments to §8.132, Definitions, §8.133, General Distinguishing Number, §8.139, Metal Dealer License Plates and Temporary Cardboard Tags, §8.144, Record of Sales and Inventory and new §8.149, Independent Mobility Motor Vehicle Dealers, all concerning General Distinguishing Numbers. The amendments to §§8.132, 8.133, 8.139, 8.144 and new §8.149 are adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7237) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTION

The adopted amendments and new section are necessary to give effect to House Bill 2216, 80th Legislature, Regular Session, 2007. Prior to its passage, it was unlawful for any person, other than a franchised dealer, to advertise, display, or offer for sale a new motor vehicle. Very few franchised dealers display or sell motor vehicles that are designed for disabled persons. As a result, disabled persons are forced to shop for vehicles equipped for the person's needs from the Internet or from catalogs. This situation prevents disabled persons from determining if the vehicle is the right size for their use and whether the special equipment is appropriate in design and functionality prior to purchasing the vehicle.

House Bill 2216 created a new category of General Distinguishing Number, that of Independent Mobility Motor Vehicle Dealer, which authorizes the mobility dealer to advertise, display, and offer for sale new vehicles that are modified for disabled drivers.

The amendments to §8.132, Definitions, add mobility motor vehicles to the definition of dealer. Therefore, references to dealers throughout the rule now include independent mobility motor vehicle dealers. The amendments also define other terms used in the rule.

New §8.133(g) requires an independent mobility vehicle dealer to maintain documentation at its dealership to show that it meets the license requirements under Occupations Code, §2301.002(17-a). Those requirements are that the dealer: 1) hold a General Distinguishing Number; 2) is a licensed converter; 3) is engaged in the business of buying, selling, or exchanging mobility motor vehicles and servicing or repairing the devices installed on mobility motor vehicles at an established and permanent place of business in this state; and 4) is certified by the manufacturer of each mobility device that the dealer installs, if the manufacturer offers that certification.

New subsection (g) of §8.133 also requires that the dealer maintain documentation to show that it meets the license requirements in Transportation Code, §503.0295 (as added by House Bill 2216). Those requirements are that the dealer: 1) agrees to comply with Government Code, Chapter 469 regarding the elimination of architectural barriers; 2) maintains a garagekeeper's insurance policy in an amount of at least $50,000 and a products-completed operations insurance policy in an amount of at least $1 million per occurrence and in the aggregate; 3) holds a welder's certification, or that the person's approved subcontractor holds such certificate, that complies with the standards of the American Welding Society Sections D1.1 and D1.3, if the person or subcontractor will perform any structural modifications; and 4) is registered with the National Highway Traffic and Safety Administration. Subsequent subsections are relettered.

Amendments to §8.139(n) establish the number of metal dealer license plates available to an independent mobility motor vehicle dealer. The plate limits correspond to the number of metal dealer license plates available to other types of independent dealers issued General Distinguishing Numbers. Subsequent subparagraphs are relettered.

Amendments to §8.144, Record of Sales and Inventory, reflect the additional recordkeeping requirements placed on independent mobility motor vehicle dealers under added Transportation Code, §503.0295. Independent Mobility Motor Vehicle Dealers must maintain written records until at least the third anniversary of the date that adaptive work is performed. Subsequent subsections are relettered.

New §8.149, Independent Mobility Motor Vehicle Dealers, clarifies the involvement required of a franchised dealer at the time of the sale of a mobility vehicle to a consumer. The statute allows a mobility motor vehicle dealer to sell or arrange the sale and delivery of the mobility motor vehicle at the mobility dealer's place of business if the transaction occurs through or by a franchised dealer of the motor vehicle's chassis line make. This section provides that the appropriate franchised dealer shall apply for the title and registration. However, it allows the mobility dealer to prepare the paperwork that is necessary for the franchised dealer to title the vehicle in the name of the purchaser. This section allows the mobility dealer and the franchised dealer to work together through the vehicle titling process and eliminates duplicative work.

COMMENTS

The department conducted a public hearing on October 30, 2007, to receive comments concerning the proposed amend-

ments and new section. No comments were given during the public hearing, however, the department received five written comments. Written comments were received from four organizations, the Texas Chapter, Paralyzed Veterans of America, the Center on Independent Living, the Coalition of Texans with Disabilities, and the Texas Automobile Dealers Association.

Comment:

Three commenters supported the amendments as written, stating that their members rely on structurally modified mobility vehicles for their independence, and on specialized businesses known as mobility dealers to install and service adaptive equipment. They stated that out-of-sync laws prevented mobility dealers from helping Texans with disabilities who want to drive their own vehicles and believe adoption of the amendments will achieve a workable solution to the problem.

Response:

The department appreciates the comments and agrees that these rules along with the new statutory language will benefit individuals attempting to purchase modified mobility vehicles.

Comment:

Three commenters stated that it is important to note that a specially modified new motor vehicle sold to people with disabilities at the mobility dealership will still have the transaction processed through a franchised dealer.

Response:

The department agrees with this assessment. The language in Occupations Code, §2301.361(a)(3) allows the mobility dealer to sell or arrange for the sale of a new vehicle if the transaction occurs through or by a franchised dealer of the vehicle's chassis line make. The department cannot eliminate the requirement that the franchise dealer process the vehicle title and registration application. The language in §8.149 clarifies the involvement of the franchise dealer in the title transaction.

Comment:

One commenter suggested that §8.149 be revised to clarify that the only method to accomplish titling and registration of a new mobility motor vehicle is through a franchised dealer.

Response:

The department disagrees. The statute is clear on that point. The purpose of §8.149 is to describe the minimum involvement required of a franchised dealer to satisfy the requirements of the statute. The department believes the language in §8.149 clearly provides the required information. Three other commenters understood and noted in their comments that the transaction occurred through a franchised dealer.

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005 and §2301.153 and Transportation Code, §503.002, which authorize the commission to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301 and Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.002 and §2301.361; and Transportation Code, §§503.001, 503.021, 503.029, 503.0295, and 503.036.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER A. TRANSPORTATION PLANNING

43 TAC §15.2, §15.9

The Texas Department of Transportation (department) adopts amendments to §15.2, Definitions, and new §15.9, Corridor Advisory Committees. The amendments to §15.2 are adopted with changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7243). New §15.9 is adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7243) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTION

Transportation Code, Chapter 227 authorizes the department to plan and construct a new set of intermodal transportation facilities, known as the Trans-Texas Corridor, which will integrate highway, rail, and utility components.

Transportation Code, §227.012 requires the Texas Transportation Commission (commission) to consider the criteria prescribed in that section when selecting a route for a segment of the Trans-Texas Corridor. Transportation Code, §227.013 provides that before the designation of a route for a segment of the Trans-Texas Corridor, the department shall hold at least one public hearing in each county through which the segment may pass.

The department is currently engaged in the planning and environmental review of elements of the Trans-Texas Corridor and is establishing development plans for those elements that will define facilities to be developed as part of that element. The department is also currently engaged in the planning and environmental review of facilities that serve a connectivity or financing purpose to an element of the Trans-Texas Corridor and that may become all or part of a segment of the Trans-Texas Corridor. The scope of work under the comprehensive development agreement for the Oklahoma to Mexico/Gulf Coast element of the Trans-Texas Corridor (TTC-35) provides for the developer to work with the department to prepare a master development plan that will identify facilities that may be developed as part of the

project. The department intends to establish a similar scope of work for the development of the corridor planned as part of Interstate Highway 69 (TTC-69).

However, focusing only on what can be viewed as one piece of the puzzle, in this case the development of the Trans-Texas Corridor, will not fully provide the transportation solutions needed to remedy critically important mobility needs in the state. At the July 26, 2007 and August 23, 2007 meetings of the Texas Transportation Commission, the commission requested that rules be drafted that would authorize the creation of committees to assist the department in the planning and development of major corridors in the state, including the designation of routes for and construction of segments of the Trans-Texas Corridor. For example, a committee could be created to assist the department in the planning and development of the "35 corridor", which includes I-35 and TTC-35.

Transportation Code, §201.601 and 23 U.S.C. §135 require the department to develop a statewide transportation plan and transportation improvement program that encompasses all modes of transportation. Transportation Code, §201.601, 23 U.S.C. §135, and other law requires the department to seek opinions and assistance from other state agencies, political subdivisions, and other interested parties concerning the transportation plan and transportation improvement program.

Transportation Code, §227.002 authorizes the department to establish procedures necessary or convenient to implement and administer Transportation Code, Chapter 227. Transportation Code, §227.013 requires the department to provide for public participation and obtain public input in the designation of a route for a segment of the Trans-Texas Corridor. Transportation Code, §227.032 requires the department to consider advice solicited from county commissioners courts, governing bodies of municipalities, and metropolitan planning organizations in the connection of a segment of the Trans-Texas Corridor to significant farm-to-market and ranch-to-market roads and major county and city arterials.

Amendments to §15.2, Definitions, change the definition of corridor to clarify that a corridor may include rail and utility route alignments and provide for the movement of people and goods, to clarify that mobility projects include the construction of facilities on a new location as well as adding lanes to an existing facility, and to add the definition of Trans-Texas Corridor for the purposes of §15.9.

New §15.9, Corridor Advisory Committees, provides that the commission by order will create advisory committees to assist the department in the transportation planning process for the Interstate Highway 35 corridor (including TTC-35) and in the corridor planned as part of Interstate Highway 69 (including TTC-69) and may create an advisory committee for any other corridor, including an element of the Trans-Texas Corridor.

The purpose of an advisory committee is to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the corridor for which it is created and in the establishment of development plans for that corridor. An advisory committee's advice and recommendations will provide the department with an enhanced understanding of public, business, and private concerns about the corridor for which it is created, facilitating the department's communications and project development objectives and resulting in greater cooperation between the department and all affected parties during project planning and development.

New §15.9 prescribes the membership and duties of a corridor advisory committee. An advisory committee shall report to the executive director its advice and recommendations on transportation improvements to be made in the corridor for which it is created, including facilities to be included in a development plan for that corridor, facilities to be included in a development plan for an element of the Trans-Texas Corridor, and upgrades and other improvements to be made to existing facilities located in that corridor, and on other corridor level planning and development matters as requested by the department. In developing advice and recommendations, an advisory committee will evaluate economic, political, societal, and demographic population trends affecting transportation and will consider existing facilities, upgrades to existing facilities, new or planned facilities, multimodal solutions, and available financing options.

New §15.9 provides that an advisory committee is subject to the requirements for operating procedures and reimbursement of expenses applicable to a department advisory committee under 43 TAC §1.85 and prescribes a sunset date of December 31, 2009 for an advisory committee.

COMMENTS

Comments on the proposed amendments and new section were received from one individual. The commenter indicated that his comments were not specific comments to any proposed rule being considered by the commission, but instead were general philosophical comments to try and avoid problems his committee encountered.

The commenter first indicated that the idea of separating the corridor advisors is an excellent concept. Those members of his committee from locations along I-35 never fully appreciated the specific concerns of the I-69 members, and this new concept will help to alleviate those difficulties.

Comment: The commenter's chief philosophical concern is that getting this needed local input may cause a further dilution of seeing the bigger picture of how all modes of transportation in Texas need to interact, instead of looking at local project impacts. Committee members that are selected need to be able to offer ideas on how to solve statewide transportation issues.

Response: The new committee structure provided in §15.9 and new §24.13, authorizing the creation of corridor segment committees, along with the Trans-Texas Corridor advisory committee established under 43 TAC §1.85, will better address and distinguish between corridor-wide issues and local issues and concerns. The new committee structure, particularly the corridor segment committees, is intended to provide a means for obtaining input on local issues. The corridor advisory committees will need to provide advice and recommendations on corridor-level planning and development matters, and the department agrees that persons who are selected as committee members need to be able to carry out those responsibilities. No change to the rule has been made as a result of this comment.

Comment: The commenter's other concern is that the original concept of the Trans-Texas Corridor was to be multimodal (i.e., highways, rail, and utilities). The rail and utility components are extremely critical to Texas' transportation future, and their unique problems with grade and alignment do not always gel with the engineering designs of tollways. The commenter asks whether it would be possible to amend the rule to provide an additional

separate advisory committee to study and recommend rail and another to recommend utilities.

Response: The department is statutorily required to develop a statewide transportation plan and transportation improvement program that encompasses all modes of transportation. Consistent with that requirement, Transportation Code, Chapter 227 authorizes the development of corridors that include facilities of different modes, such as highways, rail, and utilities. An advisory committee may be established under §15.9 for the purpose of providing advice and recommendations on transportation improvements to be made in the corridor for which it is created and is required to consider multimodal solutions. No change to the rule has been made as a result of this comment.

In addition, the department revised §15.2 to clarify the meaning of terms used in 43 TAC Chapter 15, Subchapter A.

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, Transportation Code, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Transportation Code, Chapter 227, and Government Code, Chapter 2110, which requires a state agency establishing an advisory committee to by rule state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 227, and Government Code, Chapter 2110.

§15.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Clean Air Act Amendments of 1990 (CAAA)--Amendments to the Clean Air Act of 1970 (CAA) (42 U.S.C. §7401 et seq.), including procedures that apply to all transportation plans, programs, and projects as they relate to air quality.

(2) Commission--The Texas Transportation Commission.

(3) Conformity--Clean Air Act requirements that transportation plans and transportation improvement programs in nonattainment or maintenance areas meet the intent of the Texas State Implementation Plan (SIP) and the U.S. Environmental Protection Agency (EPA) conformity regulations contained in 40 C.F.R. Part 51. Emissions caused by transportation plans and programs in these areas must not exceed the level of motor vehicle emissions allowed in Texas' SIP and the EPA regulations.

(4) Corridor--A broad geographical band with no predefined size or scale that follows a general directional flow, providing for the movement of people and goods and connecting major sources of trips. It involves a nominally linear transportation service area that may contain a number of streets, highways, rail, utility, and transit route alignments.

(5) Department--The Texas Department of Transportation.

(6) District--One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(7) Environmental Protection Agency (EPA)--The federal agency primarily responsible for environmental protection, including air quality as it relates to this subchapter.

(8) Executive director--The executive director of the Texas Department of Transportation or his or her designee.

(9) Federal discretionary program--Special set-aside funds to be included as line item discretionary projects designated by the United States Congress.

(10) Federal Highway Administration (FHWA)--The federal agency primarily responsible for highway transportation.

(11) Federal Transit Administration (FTA)--The federal agency primarily responsible for public mass transportation.

(12) Governor--The governor of the State of Texas or his or her designee.

(13) Major revision--An amendment to the Statewide Transportation Improvement Program involving a reallocation of funds between two or more districts or two or more metropolitan planning organizations or a metropolitan planning organization and a district.

(14) Metropolitan planning organization (MPO)--The forum for cooperative transportation decision making for the metropolitan planning area. The MPO is also the organization that is responsible for carrying out the transportation planning process for the metropolitan area.

(15) Metropolitan planning organization policy board--The forum and committee structure (e.g., Regional Transportation Council, Steering Committee, Policy Advisory Committee) established under Section 134 of Title 23, U.S. Code, Section 5303 of Title 49, U.S. Code, and the Governor's Designation Agreement as the group responsible for giving an MPO overall transportation policy guidance.

(16) Mobility projects--Transportation projects that add additional mainlanes to an existing facility or construct lanes on a new location and which have a length of at least one mile.

(17) Rural transportation improvement program--A staged, multiyear, intermodal program of transportation projects which is developed by the department, in consultation with local officials, for areas of the state outside of the metropolitan planning area boundaries. The rural TIP includes a financially constrained plan that demonstrates how the program can be implemented.

(18) Subarea--An area with no predefined size or scale that focuses on a non-linear part of a metropolitan area, such as an activity center or other geographic portion of a region.

(19) Surface Transportation Program (STP)--The block grant type program established by 23 U.S.C. §133.

(20) Texas Commission on Environmental Quality (TCEQ)--The state agency responsible for coordination of natural resources and air quality for the state, including development of the State Implementation Plan.

(21) Transportation control measure (TCM)--Any measure used for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.

(22) Trans-Texas Corridor--Has the meaning provided in §24.11 of this title (relating to Comprehensive Development Agreements).

(23) Unified Planning Work Program (UPWP)--The governing planning document, prepared by an MPO on an annual basis, which identifies the transportation planning work to be undertaken within the metropolitan planning area.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706367
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 3, 2008
Proposal publication date: October 12, 2007
For further information, please call: (512) 463-8683

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CHAPTER 17. VEHICLE TITLES AND REGISTRATION

The Texas Department of Transportation (department) adopts amendments to §17.3, Motor Vehicle Certificates of Title, §17.23, Temporary Registration Permits for Motor Vehicles, and new §17.8, Landowner's Lien. The amendments to §17.3 and §17.23 and new §17.8 are adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7246) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTION

The adopted amendments and new section are necessary to implement the provisions of House Bills 481, 1260, 2931, and 3437 of the 80th Legislature, Regular Session, 2007; update statutory references; clarify existing information; and remove unnecessary language.

House Bill 481 amended Transportation Code, Chapter 520 to expand the methods by which a vehicle transfer notification may be submitted to the department by providing for electronic submission through the department's internet website. Written notification may also be submitted to the department by mail or in person at one of the department's regional offices.

House Bill 1260 added Government Code, §431.039 to create a title transfer fee exemption for certain military personnel that have been deployed to hostile fire zones.

House Bill 2931 added Property Code, Chapter 70, Subchapter F to create a method by which a landowner may obtain and perfect a lien against a motor vehicle that has damaged the landowners' fence.

House Bill 3437 allowed counties that meet certain criteria to impose an additional fee of up to $10 to fund transportation projects within the county. At present, Hidalgo and Cameron counties are the only counties that meet the criteria.

The amendments correct the existing rules to ensure they are consistent with all the statutory changes. In addition, clarification of current policy has been added, nonsubstantive corrections in statutory citations have been made, and unnecessary language has been removed.

Amendments to §17.3(a)(3) reformat the language to explain that Transportation Code, §501.036 provides for optional titling of farm semitrailers. Amendments to §17.3(a)(4) make the language consistent with the definition of "motor vehicle" found in Transportation Code, §501.002(14) and §17.3(a)(4)(C)(i) adds "manufactured home or" to make the language consistent with the terms used in Occupations Code, Chapter 1201. New clause (iv) of §17.3(a)(4)(C) is added to explain the existing requirements for title and registration of a park model type trailer. The existing requirements are necessary due to federal regulations. The amendment to §17.3(b)(2)(I) deletes language that is no longer necessary. The department's registration and title system has been implemented statewide and all counties have implemented the automated registration and title system. As required by House Bill 1260, amendments to §17.3(d), Certificate of Title Issuance, reformat the language to add a new paragraph (1) providing an exemption from the payment of title application fees for certain military personnel that are being deployed. Subsequent paragraphs are renumbered accordingly. Amendments to §17.3(e), Replacement of certificate of title, more clearly explain the existing fees for obtaining a certified copy of a certificate of title. Amendments to §17.3(f), Department notification of second hand vehicle transfers, provides a specific statutory citation, broadens how transfer notifications may be submitted as required by House Bill 481, and eliminates unnecessary language by deleting paragraphs (1) and (3) because they provided no additional information to that outlined in the statute. Subsequent paragraphs are renumbered accordingly.

New §17.8, Landowner's Lien, is added to comply with the requirements of House Bill 2931. The new section provides the requirements for recording and discharging a landowner's lien on a motor vehicle for payment of damages to the landowner's fence. Section 17.8 requires that the application for a certificate of title be accompanied by an original or certified copy of the court order so that the department can validate the lien. This section uses the release of lien procedure established under §17.3(h).

Section 17.23(b)(2)(C)(ii) exempts applicants for an annual permit from the payment of the optional county fee for transportation projects provided for in the Transportation Code, §502.1725, as required by House Bill 3437.

COMMENTS

No comments on the proposed amendments and new section were received.

SUBCHAPTER A. MOTOR VEHICLE CERTIFICATES OF TITLE

43 TAC §17.3, §17.8

STATUTORY AUTHORITY

The amendments and new section are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §501.131, which allows the department to adopt rules to administer Chapter 501, regarding titling of motor vehicles, and Transportation Code, §502.0021, which authorizes the department to adopt rules governing the issuance of motor vehicle registration.

CROSS REFERENCE TO STATUTE

Transportation Code, §502.1725 and §520.023; Government Code, §431.039; and Property Code, Chapter 70, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706368
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 3, 2008
Proposal publication date: October 12, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.23

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §501.131, which allows the department to adopt rules to administer Chapter 501, regarding titling of motor vehicles, and Transportation Code, §502.0021, which authorizes the department to adopt rules governing the issuance of motor vehicle registration.

CROSS REFERENCE TO STATUTE

Transportation Code, §502.1725 and §520.023; Government Code, §431.039; and Property Code, Chapter 70, Subchapter F.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 3, 2008
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For further information, please call: (512) 463-8683

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CHAPTER 24. TRANS-TEXAS CORRIDOR
SUBCHAPTER B. DEVELOPMENT OF FACILITIES

43 TAC §24.13

The Texas Department of Transportation (department) adopts new §24.13, Corridor Planning and Development. New §24.13 is adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7254) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

Transportation Code, Chapter 227 authorizes the department to plan and construct a new set of intermodal transportation facilities, known as the Trans-Texas Corridor, which will integrate highway, rail, and utility components.

Transportation Code, §227.012 requires the commission to consider the criteria prescribed in that section when selecting a route for a segment of the Trans-Texas Corridor. Transportation Code, §227.013 provides that before the designation of a route for a segment of the Trans-Texas Corridor, the department shall hold at least one public hearing in each county through which the segment may pass.

The department is currently engaged in the planning and environmental review of elements of the Trans-Texas Corridor and is establishing development plans for those elements that will define facilities to be developed as part of that element. The department is also currently engaged in the planning and environmental review of facilities that serve a connectivity or financing purpose to an element of the Trans-Texas Corridor and that may become all or part of a segment of the Trans-Texas Corridor. The scope of work under the comprehensive development agreement for the Oklahoma to Mexico/Gulf Coast element of the Trans-Texas Corridor (TTC-35) provides for the developer to work with the department to prepare a master development plan that will identify facilities that may be developed as part of the project. The department intends to establish a similar scope of work for the development of the corridor planned as part of Interstate Highway 69 (TTC-69).

However, focusing only on what can be viewed as one piece of the puzzle, in this case the development of the Trans-Texas Corridor, will not fully provide the transportation solutions needed to remedy critically important mobility needs in the state. At the July 26, 2007 and August 23, 2007 meetings of the Texas Transportation Commission (commission), the commission requested that rules be drafted that would authorize the creation of committees to assist the department in the planning and development of major corridors in the state, including the designation of routes for and construction of segments of the Trans-Texas Corridor. For example, a committee could be created to assist the department in the planning and development of the "35 corridor", which includes I-35 and TTC-35.

Transportation Code, §201.601 and 23 U.S.C. §135 require the department to develop a statewide transportation plan and transportation improvement program that encompasses all modes of transportation. Transportation Code, §201.601, 23 U.S.C. §135, and other law requires the department to seek opinions and assistance from other state agencies, political subdivisions, and other interested parties concerning the transportation plan and transportation improvement program.

Transportation Code, §227.002 authorizes the department to establish procedures necessary or convenient to implement and administer Transportation Code, Chapter 227. Transportation Code, §227.013 requires the department to provide for public participation and obtain public input in the designation of a route for a segment of the Trans-Texas Corridor. Transportation Code, §227.032 requires the department to consider advice solicited from county commissioners courts, governing bodies of municipalities, and metropolitan planning organizations in the connection of a segment of the Trans-Texas Corridor to significant farm-

to-market and ranch-to-market roads and major county and city arterials.

New §24.13, Corridor Planning and Development, implements the requirements of Transportation Code, §§227.012 - 227.013 by prescribing criteria for the designation of a route for a segment of the Trans-Texas Corridor, and provides for the creation of corridor segment committees to assist the department in the planning and development of segments of the Trans-Texas Corridor and facilities that may become all or part of a segment of the Trans-Texas Corridor.

The new committee structure provided in §24.13 and new §15.9, authorizing the creation of corridor advisory committees, along with the Trans-Texas Corridor advisory committee established under 43 TAC §1.85, will better address and distinguish between corridor-wide issues and local issues and concerns, and will provide strong local and regional influence in the designation of a route for a segment of the Trans-Texas Corridor, and in the decision whether or not to construct a proposed segment of the Trans-Texas Corridor or a facility that may become all or part of a segment of the Trans-Texas Corridor.

New §24.13(a), Definitions, defines words and terms used in the new section.

New §24.13(b), Route designation, prescribes the criteria and information that the commission will consider when designating a route for a segment of the Trans-Texas Corridor. The commission will consider the criteria provided by Transportation Code, §227.012, comments at a public hearing held as required by Transportation Code, §227.013, and the advice and recommendations of a corridor segment committee created under §24.13(c).

New §24.13(c), Corridor segment committees, provides that the commission by order will create a corridor segment committee before initiating the environmental review process for the construction of a proposed segment of the Trans-Texas Corridor or, if a tiered environmental review process is used, before the start of the Tier Two review. A corridor segment committee will be created for a proposed segment of the Trans-Texas Corridor and for a facility that serves a connectivity or financing purpose to an element of the Trans-Texas Corridor and that may become a segment of the Trans-Texas Corridor.

New §24.13(c)(1) describes the purpose of a corridor segment committee, which is to provide input, advice, and recommendations to the commission and the department regarding the designation of a route for the segment of the Trans-Texas Corridor for which the committee was created and regarding the construction of the proposed segment of the Trans-Texas Corridor or a facility that may become all or part of a segment of the Trans-Texas Corridor.

New §24.13(c)(2) prescribes the membership of a corridor segment committee. Members of a committee will be appointed by counties, metropolitan planning organizations, and other entities designated by the commission within whose boundaries or service area all or part of a proposed segment or facility is located. Having members appointed by those entities will ensure that a committee represents the interests of local and regional groups that have an interest in where a segment or facility is located and whether it will be constructed.

New §24.13(c)(3) prescribes the duties of a corridor segment committee. As part of the public involvement process, the department shall request the input of a corridor segment committee during the environmental review of a segment or facility proposed to be constructed. In conjunction with a hearing held under Transportation Code, §227.013, the department will request the input of a corridor segment committee on the designation of a route for a proposed segment. A corridor segment committee shall report to the executive director its advice and recommendations on the route of the proposed segment, whether to construct the proposed segment or facility, and other segment level planning, development, and financing matters as requested by the department.

To ensure that there is local and regional involvement in transportation decision making and to ensure that local and regional groups that have an interest in where a segment or facility is located and whether it will be constructed are adequately represented, new §24.13(c)(4) provides that the commission shall consider and give great weight to the recommendations of a corridor segment committee before the commission may designate the route of the proposed segment or decide whether or not the proposed segment or facility is to be constructed.

New §24.13(c)(5) provides that a corridor segment committee is subject to the requirements for committee operations and procedures applicable to a statutory advisory committee under 43 TAC §1.82, unless a requirement is in conflict with the requirements of §24.13, in which case §24.13 controls. Among other things, this makes corridor segment committees subject to open meetings, open records, and conflict of interest requirements applicable to the commission and the department.

To ensure that confidential information is protected as required by law, new §24.13(c)(6) provides that the department may require members of a corridor segment committee to sign agreements to maintain the confidentiality of and not disclose information provided to a committee that is confidential by law or that is not subject to disclosure, inspection, or copying under the Texas public information law, Government Code, Chapter 552.

COMMENTS

Comments on the new section were received from one individual. The commenter indicated that his comments were not specific comments to any proposed rule being considered by the commission, but instead were general philosophical comments to try and avoid problems his committee encountered.

The commenter first indicated that the idea of separating the corridor advisors is an excellent concept. Those members of his committee from locations along I-35 never fully appreciated the specific concerns of the I-69 members, and this new concept will help to alleviate those difficulties.

Comment: The commenter's chief philosophical concern is that getting this needed local input may cause a further dilution of seeing the bigger picture of how all modes of transportation in Texas need to interact, instead of looking at local project impacts. Committee members that are selected need to be able to offer ideas on how to solve statewide transportation issues.

Response: The new committee structure provided in §24.13 and new §15.9, authorizing the creation of corridor advisory committees, along with the Trans-Texas Corridor advisory committee established under 43 TAC §1.85, will better address and distinguish between corridor-wide issues and local issues and concerns. The new committee structure, particularly the corridor segment committees, is intended to provide a means for obtaining input on local issues. The corridor advisory committees will need to provide advice and recommendations on corridor-level

planning and development matters, and the department agrees that persons who are selected as committee members need to be able to carry out those responsibilities. No change to the rule has been made as a result of this comment.

Comment: The commenter's other concern is that the original concept of the Trans-Texas Corridor was to be multimodal (i.e., highways, rail, and utilities). The rail and utility components are extremely critical to Texas' transportation future, and their unique problems with grade and alignment do not always gel with the engineering designs of tollways. The commenter asks whether it would be possible to amend the rule to provide an additional separate advisory committee to study and recommend rail and another to recommend utilities.

Response: The department is statutorily required to develop a statewide transportation plan and transportation improvement program that encompasses all modes of transportation. Consistent with that requirement, Transportation Code, Chapter 227 authorizes the development of corridors that include facilities of different modes, such as highways, rail, and utilities. An advisory committee may be established under §15.9 for the purpose of providing advice and recommendations on transportation improvements to be made in the corridor for which it is created, and is required to consider multimodal solutions. No change to the rule has been made as a result of this comment.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, Transportation Code, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Transportation Code, Chapter 227, and Government Code, Chapter 2110, which requires a state agency establishing an advisory committee to by rule state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 227, and Government Code, Chapter 2110.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER O. CRASH RECORDS INFORMATION SYSTEM

43 TAC §§25.971 - 25.974

The Texas Department of Transportation (department) adopts new §25.971, Purpose, §25.972, Definitions, §25.973, Medical Examiner's Report, and §25.974, Officer Accident Report Modifications. The new §§25.971 - 25.974 are adopted without changes to the proposed text as published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7256) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

Senate Bill 766, 80th Legislature, Regular Session, 2007, transfers the collection and analysis of accident records from the Department of Public Safety to the Texas Department of Transportation effective October 1, 2007. Adopted new Subchapter O, §§25.971 - 25.974, is designed to implement legislation affecting the accident record process and facilitates the transfer of the accident records function to the department.

House Bill 423, 80th Legislature, Regular Session, 2007, requires a medical examiner or justice of the peace acting as a coroner to report certain information about fatal traffic accidents to the department. This report must include the results of any toxicology testing that was conducted or provide a date when this information will be available if results are pending.

New §25.971, Purpose, defines the purpose of the new subchapter as the implementation of Transportation Code, Chapter 550, Subchapters D and E, regarding the collection of accident reports and medical examiner's reports by the Texas Department of Transportation.

New §25.972, Definitions, defines the terms and words used in the new rules: department, and medical examiner.

New §25.973, Medical Examiner's Report, provides details on the information required to be submitted to the department. The new section requires the medical examiner or justice of the peace to provide this information by the 11th day of each month for the preceding quarter as required by Transportation Code, §550.081. The new section does not require reporting of information previously submitted. To comply with Transportation Code, §550.081, new §25.973 also requires the medical examiner to report results of any toxicology tests conducted on the deceased along with the name of the laboratory or facility that conducted the testing. If toxicology testing was conducted, but results are unavailable, the report must indicate this. The medical examiner must submit a supplemental report when this information becomes available.

New §25.974, Officer Accident Report Modifications, allows the department to make minor, non-substantive technical changes to an accident report submitted by a law enforcement officer without requiring the officer to modify the report. Allowing these modifications to be made by the department during processing of the accident report will streamline the existing crash records entry process and allow for a more efficient process. Section 25.974 also provides that an officer's accident report may be modified by an officer in the reporting officer's chain of command. This provision is needed due to potential unavailability or change in employment of the reporting officer.

COMMENTS

No comments on the proposed new sections were received.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of work within the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §§550.065, 550.068, and 550.081.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2007.

TRD-200706371
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: January 3, 2008
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For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Council for Developmental Disabilities

Title 40, Part 21

The Texas Council for Developmental Disabilities (Council) will review and consider for re-adoption, re-adopt with amendments, or repeal Title 40, Part 21, Chapter 876, relating to General Provisions, and Chapter 877, related to Grant Awards. This review is done pursuant to Texas Government Code, §2001.039.

The Council will assess whether the reason(s) for adopting or re-adopting these rules continue to exist, whether the rules reflect current legal and policy considerations and the current procedures of the Council, and/or whether these chapters are in compliance with Chapter 2001 of the Texas Government Code (Administrative Procedure Act).

All comments or questions in response to this notice of review may be submitted to Carl Risinger by mail at 6201 E. Oltorf, Suite 600, Austin, Texas; by facsimile at (512) 437-5434; or by e-mail at **tcdd@tcdd.state.tx.us**. Any proposed changes to these chapters as a result of this review will be published in the Proposed Rules section of the *Texas Register* and will be open for public comments for a 30-day period prior to final adoption of any repeal, amendment or re-adoption.

TRD-200706451
Roger A. Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: December 19, 2007

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Texas Residential Construction Commission

Title 10, Part 7

The Texas Residential Construction Commission (commission) proposes the intention to review 10 TAC Chapter 313, State-sponsored Inspection and Dispute Resolution Process (SIRP). This review is proposed in accordance with Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. A review must include an assessment of whether the reasons for the rules continue to exist. The rules in Chapter 313 were first adopted to be effective July 8, 2006.

The provisions in Chapter 313 set forth a uniform procedure for the administration of SIRP requests, assignment of and inspection by third-party inspectors, inspection reports, and appeal process.

The commission has conducted a preliminary review of the rules in Chapter 313 and has determined that reasons for adopting these rules continue to exist. These rules are needed for compliance with provisions of Texas Residential Construction Commission Act (ACT), Property Code §§401.001 - 446.006. The Act was promulgated by the 78th Legislature, effective September 1, 2003, and amended as recently as the 80th Legislative session, making amendments effective September 1, 2007. The Act regulates residential homebuilders in the State of Texas and provides a state-sponsored inspection process to resolve disputes between certain homeowners and builders. The commission invites comments on whether the reasons for the rules in Chapter 313 continue to exist.

The commission's review of Chapter 313 has revealed provisions which require modification to simplify rule language, to improve program efficiency, and to comport with statutory requirements. The commission concurrently proposes to modify sections within Chapter 313, as described in the Proposed Rules section of this issue of the *Texas Register*. These changes are proposed as a result of the commission's rule review and for consistency with the commission's ongoing commitment to regulatory reform. The specific changes are noted in the proposed rule preambles of Chapter 313. The commission did not identify provisions in Chapter 313 to be repealed; all sections are still needed and are proposed, with amendments, in Chapter 313.

Interested persons may submit written comments on the proposed rule review and necessity of provisions in Chapter 313 to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P. O. Box 13509, Austin, Texas, 78711. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Chapter 313 rule review" with the rule number(s) in the subject line. Comments regarding the necessity of Chapter 313 or of a specific rule in Chapter 313 should be organized in numerical order and, when submitted concurrently with comments regarding the proposed rule amendments, should be clearly identified as relating to the rule review and necessity of the identified rule. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed sections in the *Texas Register*. Comments received after that deadline submission date or comments submitted electronically without "Chapter 313 rule review" in the subject line may not be considered.

TRD-200706417
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: December 18, 2007

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Adopted Rule Reviews

State Employee Charitable Campaign

Title 34, Part 12

The State Policy Committee of the State Employee Charitable Campaign (SECC) has completed its review of Chapters 325 - 327 and 329 - 334 of Title 34 of the Texas Administrative Code. Notice of the rule review was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7086).

No public comments were received regarding the rule review.

The Board has determined that the reasons for adopting the rules contained in the reviewed chapters continue to exist, and the Board re-adopts the rules in their entirety.

Notice of any changes to these rules will be published in the *Texas Register* as required under the Administrative Procedures Act, Texas Government Code, Chapter 2001.

The Board adopts this rule review under the authority of Texas Government Code, §2001.039, which requires all agencies to review rules periodically to determine whether the reasons for the adoption of the rules continue to exist.

This rule review is adopted under the authority of the Texas Government Code, §659.139, which provides that the SECC must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The State Policy Committee interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

This concludes the review of Title 34, Part 12, Chapters 325 - 327 and 329 - 334.

TRD-200706402
Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Filed: December 17, 2007

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State Pension Review Board

Title 40, Part 17

Chapter 605, Standardized Form

The State Pension Review Board re-adopts the rules contained in Title 40, Chapter 605 of the Texas Administrative Code pursuant to the requirements of the Texas Government Code, §2001.039.

The notice of the proposed rule review was published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6568). The State Pension Review Board has conducted a thorough review of the rules in Chapter 605 as to whether the reason for adopting or re-adopting these rules continues to exist.

No comments were received regarding the review of these rules.

As a result of the review, the Board has determined that the reason for adoption of these rules continues to exist. Therefore, the State Pension Review Board hereby re-adopts Chapter 605 in their entirety.

TRD-200706438
Lynda Baker
Executive Assistant
State Pension Review Board
Filed: December 18, 2007

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Texas Department of Transportation

Title 43, Part 1

The Texas Department of Transportation (department) files notice of the completion of review and, subject to the contemporaneous amendment of certain sections as specified in this notice, the readoption of 43 TAC Part 1, Chapter 17, Vehicle Titles and Registration; Chapter 18, Motor Carriers; and Chapter 28, Oversize and Overweight Vehicles and Loads.

Independent of this review, the commission contemporaneously adopts amendments to the following sections, as published elsewhere in this issue of the *Texas Register*: §17.3, Motor Vehicle Certificates of Title; and §17.23, Temporary Registration Permits.

This review and readoption has been conducted in accordance with Government Code, §2001.039. The Texas Transportation Commission (commission) has reviewed these rules and determined that the reasons for adopting them continue to exist.

The department received no comments on the proposed rule review, which was published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7935).

This concludes the review of Chapters 17, 18, and 28.

TRD-200706372
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: December 14, 2007

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 7 TAC §89.506(a)

DISCLOSURE TO PROPERTY OWNER ABOUT PROPERTY TAX LOANS

Property Tax Lender's Name: _____

Property Tax Lender's License #: _____

Property Tax Lender's Address: _____

_____

_____

What is a property tax loan?

You currently have a lien against your property for unpaid property taxes. The tax lien for unpaid taxes automatically attached to your property on January 1. You may pay the taxing unit(s) directly, or authorize the property tax lender to pay the taxes. In order for the property tax lender to pay the tax lien, you have to authorize the transfer of the lien from the taxing unit(s) and enter into a loan with the property tax lender. Unless you agree in writing, the property tax lender may not include your non-delinquent taxes in your property tax loan. The property tax loan may include unpaid property taxes, penalties, and interest. The property tax lender may also assess closing costs and interest not to exceed 18%. This transaction does not remove the tax lien against your property. If you do not pay the property tax lender under the loan agreement, you may lose your property to foreclosure.

The property tax loan is the superior lien.

If you default on any lien against your property, this property tax loan will be superior, i.e., "first in line" to be paid, over any other preexisting lien on your property (e.g., first or secondary mortgage).

You may have alternatives to this property tax loan.

If this property is your homestead and you are disabled or age 65 or older, you are entitled to tax deferral under Texas Tax Code, §33.06. You may arrange with the taxing unit(s) to enter into an installment agreement for the repayment of these taxes. You may have financing options available to you through other private lenders, such as establishing an escrow account or refinancing your existing mortgage to include the taxes. You may be able to borrow from savings or family members. You may shop around with other property tax lenders and compare the different loan terms offered by other lenders.

Foreclosure is possible.

If you don't pay, you may lose your property. The tax lien may be considered a default by any mortgage holder with a lien on the same property. The only way to correct the default is to pay off the taxes and have the lien released. Any secured loan may be foreclosed if the loan is in default. The cost of any foreclosure, either tax lien or mortgage, may be added to the amount you owe.

Contact the Office of Consumer Credit Commissioner if you have questions or problems.

For more information about property tax lenders, contact the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems. Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, (800) 538-1579, www.occc.state.tx.us.

Before you sign a property tax loan, be sure that you understand this document.

You may seek advice from an attorney or any third party before you enter into a property tax loan. You should ask about the terms of any loan you are considering and you should read any document before signing it.

Figure: 7 TAC §89.506(b)

DISCLOSURE TO TRANSFEREE
NOTICE OF 90-DAY DELINQUENCY OF PROPERTY OWNER

The Property Owner listed below has been delinquent for at least 90 consecutive days in payment of the preexisting lien on the Property described below. The obligation has been referred to a collection specialist. This notice is provided under Texas Tax Code, §32.06(f-1).

Date of Notice: _____

Property Owner's Name: _____

Property Owner's Tax Account # or Property Tax Loan # (*indicate which #'s listed*):

_____

Property Owner's Address: _____
_____
_____

Address of Property: _____
_____
_____

Legal Description of Property:

(*Insert Legal Description of Property*)

Name of Preexisting Lien Holder sending this notice (Sender):

_____

Sender's Address: _____
_____
_____

Relationship of Sender to preexisting lien (e.g., mortgage servicer, holder of first lien, etc.):

_____

If Sender is NOT the holder of the first lien, please identify the first lien holder below:

Name of First Lien Holder:

_____

First Lien Holder's Address: _____
_____
_____

Figure: 16 TAC §25.239(d)

$TCRF = \frac{RR * ClassALLOC}{BD}$	
Where:	TCRF = transmission cost recovery factor in dollars per unit, for billing each customer class.
	RR = transmission cost recovery factor revenue requirement, calculated pursuant to subsection (e) of this section.
	ClassALLOC = the customer class allocation factor used to allocate the transmission revenue requirement in the utility's most recent base rate case.
	BD = each customer class's annual billing determinant (kilowatt-hour, kilowatt, or kilovolt-ampere) for the previous calendar year.

Figure: 16 TAC §25.239(e)

RR = [revreqt + ATC]*ALLOC	
Where:	Revreqt = the sum of the return on TIC, net of accumulated depreciation and associated accumulated deferred income taxes, plus investment-related expenses such as income taxes, other associated taxes, depreciation, and transmission–related miscellaneous revenue credits, but not including operation and maintenance expenses or administrative expenses. The return on TIC shall be calculated by multiplying the TIC by the utility's weighted-average cost of capital (WACC) as established for the utility in a final commission order in a base rate case, provided that the order was filed within three years prior to the initiation of the TCRF docket. Otherwise, a proxy WACC shall be used, with a cost of equity of 10%; and the capital structure and cost of debt as reported in the utility's most recent Earnings Monitoring Report filed pursuant to §25.73 of this title (relating to Financial and Operating Reports), adjusted for known and measurable changes.
	Transmission Invested Costs (TIC) is defined in subsection (b)(2) of this section.
	Approved Transmission Charges (ATC) is defined in subsection (b)(1) of this section.
	ALLOC = the utility's Texas retail allocation of transmission revenue requirements, as established in the utility's most recent base rate case.

Figure: 22 TAC §661.99(6)

Citation	Violation	Sanction on a First Offense
§1071.251(b)	Engaging in the practice of professional land surveying without registration.	Injunction/1500
§1071.251(c)	Offering to practice professional land surveying without registration.	Injunction/1500
§1071.251(d)	Using a title or advertising a title or description that tends to convey the impression that a non registered/licensed person is a professional land surveyor.	Injunction/1500
§1071.261(a)	Failure to display the certificate or license at a person's place of business or practice.	Reprimand/100
§1071.263(a)	The practice of professional surveying while license has been placed on Inactive Status.	Revocation/1500
§1071.351(b)	Failure to secure an impression seal (§661.46).	Reprimand/100
§1071.351(d)	Application of name, seal or certification to surveying work that is not prepared by registrant/licensee or full time employee supervised by registrant/licensee.	Revocation/1500
§1071.351(e)	Allowing a non registrant/licensee to exert control over surveying work.	Revocation/1500
§1071.352(a)	Offering surveying services with no RPLS employed full-time where the services are offered.	Injunction/1500 Reprimand/1500
§1071.352(b)	Failure of group practice to properly identify the registrant responsible for the practice.	Injunction/1500 Reprimand/1500
§1071.353	Failure to file notice of assumed name.	Reprimand/100
§1071.359(a)	Failure to sign and notate "Licensed State Land Surveyor"(LSLS) on all LSLS official field notes.	Reprimand/100
§1071.359(b)	Failure to conform LSLS field notes and plats to specifications contained in Section 21 of the Natural Resources Code.	Reprimand/100
§1071.360(1) and (2)	Failure of the LSLS to notify person who has undisclosed public land enclosed and/or forward a report of undisclosed public land and the acreage to the commissioner.	Reprimand/100
§1071.361(a)	Failure to allow LSLS access to County Surveyor's records.	Reprimand/1500
§1071.361(c)	Failure to comply with any regulations prescribed by the county surveyor or the commissioners court for protecting and preserving the records.	Reprimand/1500
§1071.401(a)(1)	Fraud or deceit in obtaining a certificate or license.	Revocation/1500
§1071.401(a)(2)	Gross negligence, incompetence, or misconduct in the practice of surveying.	Revocation/1500
§1071.401(a)(3)	Violation of the Act or Board Rule.	Revocation/1500
§1071.401(b)	LSLS directly or indirectly interested in the purchase or acquisition of title to public land.	Revocation/1500
§1071.504(1)	Engaging or offering land surveying services without being registered/licensed.	Injunction/1500
§1071.504(2)	Presents or attempts to use another person's certificate, license or seal.	Revocation/1500 Injunction/1500
§1071.504(3)	Giving false or forged evidence to obtain or assist another in obtaining a registration/license.	Revocation/1500
§661.45(f)	Actions to compromise the examination.	Disqualification/1500

Citation	Violation	Sanction on a First Offense
§661.46	Failure to secure an impression seal and submit impression to the Board.	Reprimand/100
§661.52(b)	Practicing professional land surveying while on Inactive Status.	Revocation/1500
§661.52(c)	Using seal while on Inactive Status.	Revocation/1500
§661.55(a)	Failure to register firm.	Injunction/1500
§661.55(b)	Failure of RPLS/LSLS to ensure firm registration.	Reprimand/1500
§661.55(c)	Failure to notify the Board within 5 business days prior to leaving employment or no later than 24 hours after leaving employment.	Reprimand/500
§661.55(d)	Violation of this chapter.	Revocation/1500
§661.55(f)	Failure of firm to have full-time RPLS employee.	Revocation/1500
§661.57(a)	Failure to register firm.	Injunction/1500
§661.57(b)	Failure of firm to provide one full-time RPLS and for RPLS to supervise surveying work.	Firm-Injunction/1500 RPLS-Reprimand/1500
§661.57(d)	Failure to file a current certificate of registration.	Injunction/1500
§661.57(e)	Failure to file or renew firm registration.	Suspend/1500
§661.57(f)	Submitting fraudulent or misleading information or lack of employee relationship with the designated professional surveyor.	Revocation/1500
§661.57(h)	For violations of the Board's Act or Rules.	Refuse to Issue or Revoke Registration/1500
§661.60	Failure to respond to Board inquiries/orders.	RPLS-Reprimand/1500 Firm-Suspend/1500
§661.95	Failure to attend hearing.	Default Judgment
§663.1(c)	Failure to notify the Board of any change of mailing address as it occurs.	Reprimand/100
§663.1(d)	Failure to notify consumers of the name, mailing address, and phone number of the Board.	Reprimand/100
§663.3(1)	Failure to accurately and truthfully represent ones capabilities and qualifications.	Reprimand/100
§663.3(2)	Performing services for which he/she is not qualified.	Reprimand/100
§663.3(3)	Evading statutory responsibility to client or employer.	Reprimand/100
§663.4(1)	Performing surveying services if there exists any financial or other interest that may be in conflict with the obligation to render a faithful discharge of such services.	Reprimand/1500
§663.4(4)	Failure to withdraw from employment at any time during such employment or engagement when it becomes apparent that it is not possible to faithfully discharge the duty and performance of services owned the client or employer.	Reprimand/1500
§663.4(5)	Accepting remuneration from any party other than his/her client or employer for a particular project nor have any other direct or indirect financial interest in other services or phase of service to be provided for such project.	Reprimand/1500
§663.4(6)	Failure to keep inviolate the confidences of his/her client or employer.	Reprimand/1500
§663.5	Failure to perform work with integrity, truthfulness and accuracy. Misleading the public.	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.5(1)	Allowing a person who is not registered or licensed to exert control over professional work.	Reprimand/1500
§663.5(2)	Indulging in publicity that is false, misleading or deceptive.	Reprimand/100
§663.5(3)	Misrepresenting the amount or extent of prior education or experience to any employer, client, or the board.	Reprimand/100
§663.5(5)	Representing themselves as being engaged in a partnership or association when no partnership or association exists.	Reprimand/100
§663.5(6)	Recommend to a client services of another for the purpose of collecting a fee for himself, without the knowledge and consent of client.	Reprimand/100
§663.6(1)	Failure to make known to the board any unauthorized practice of which the registrant has personal knowledge.	Reprimand/100
§663.6(2)	Failure to divulge any information, of which the registrant has personal knowledge, related to any unauthorized practice to the board upon request.	Reprimand/100
§663.6(3)	Delegate responsibility to, nor aid or abet, an unauthorized person to practice or offer to practice.	Reprimand/1500
§663.8(1)	Failure to abide by and conform to the registration and licensing laws of the state.	Reprimand/1500
§663.8(2)	Failure to abide by and conform to the provisions of the state code and all local codes and ordinances.	Reprimand/1500
§663.8(4)	Signing or impressing ones seal or stamp upon documents not prepared by him/her or knowingly permit ones seal or stamp to be used by any other person.	Reprimand/1500
§663.8(5)	Submitting a request or a competitive bid to perform professional surveying services for a governmental entity or political subdivision of the State of Texas unless specifically authorized by state law.	Reprimand/100
§663.9(a)	Offering or promising to pay any commission, contribution, gift, favor, gratuity, or reward as an inducement to secure any specific work without full disclosure to all interested parties.	Reprimand/100
§663.9(b)	Making, publishing or cause to be made or published any representation or statement concerning ones professional qualifications or those of his/her partners or associates that is misleading.	Reprimand/100
§663.9(c)	Failure to have personal knowledge of documents, plats, maps or reports that bear the surveyor's seal or signature.	Reprimand/1500
§663.10(1)	Violating any provision of the Act or Rules.	Reprimand/100
§663.10(2)	Circumventing or attempting to circumvent any provision of the Act or Rules.	Reprimand/1500
§663.10(3)	Participate in any plan, scheme or arrangement attempting to or having as its purpose the evasion of any provision of the Act or Rules.	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.10(4)	Failure to exercise reasonable care or diligence to prevent his/her partners, associates or employees from engaging in conduct which, if done by him/her, would violate any of the provisions of the Act or Rules.	Reprimand/1500
§663.10(5)	Engaging in any conduct that discredits or attempts to discredit the profession of surveying.	Reprimand/100
§663.10(6)	Permit or allow ones professional identification, seal, form, business name or service to be used or made use of to make it possible to create the opportunity for the unauthorized practice of professional surveying by any person, firm or corporation.	Reprimand/1500
§663.10(7)	Allowing an omission or making an assertion or representation that is fraudulent, deceitful or misleading or tends to create a misleading impression.	Reprimand/1500
§663.10(8)	Aid or abet any unlicensed person in connection with the authorized practice of professional surveying or any firm or corporation in the practice of professional surveying unless carried on in accordance with the Act.	Reprimand/1500
§663.11	Failure to set or leave as found markers to represent or reference boundary corners, angle points and points of curvature or tangency. Failure to show and describe the locations of such markers on the plat.	Reprimand/1500
§663.11(1)	Failure to reference and describe the survey markers as shown on the plat.	Reprimand/1500
§663.11(2)	Failure to seal and sign the plat.	Reprimand/1500
§663.15(a)	Failure to achieve a positional tolerance of 1:10,000 + 0.10 feet within the corporate city limits.	Reprimand/1500
§663.15(b)	Failure to achieve a positional tolerance of 1:7,500 +0.10 feet within the extraterritorial jurisdiction (ETJ) of any city.	Reprimand/1500
§663.15(c)	Failure to achieve a positional tolerance of 1:5,000 + 0.10 feet in rural areas outside ETJ.	Reprimand/1500
§663.15(d)	Failure to report areas to the least significant number compatible with the precision of closure.	Reprimand/100
§663.15(e)	Failure to use equipment and methods of practice capable of attaining the tolerances specified.	Reprimand/1500
§663.16(a)	Failure to delineate a property or boundary line as an integral portion of a survey. Failure to respect junior/senior property rights, footsteps of the original surveyor, intent of the parties involved, the proper application of the rules of dignity or the priority of calls, and applicable statutory and case law of Texas.	Reprimand/1500
§663.16(b)	Failure to rely upon appropriate deeds and/or other documents including those for adjoining parcels, for the location of the boundaries of the subject parcel(s).	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.16(c)	Failure to assume the responsibility for such research of adequate thoroughness to support the determination of the location of intended boundaries of the land parcel surveyed.	Reprimand/1500
§663.16(d)	Failure to connect all boundaries to identifiable physical monuments related to corners of record dignity. In the absence of such monumentation, failure to report the surveyor's opinion of the boundary location by other appropriate physical evidence.	Reprimand/1500
§663.17(a)	Failure to set monuments at sufficient depths to retain a stable and distinctive location or be of sufficient size to withstand the deteriorating forces of nature or be of such material that in the surveyor's judgment will best achieve this goal.	Reprimand/1500
§663.17(b)	Failure to set, or leave as found, sufficient, stable and reasonably permanent survey markers to represent or reference the property or boundary corners, angle points, and points of curvature or tangency. Failure to show and describe survey markers with sufficient evidence of the location of such markers on the surveyors' plat.	Reprimand/1500
§663.17(b)(1)	Failure to reference a description of survey markers shown on the plat, when written reports are filed in compliance with §663.17(b).	Reprimand/1500
§663.17(b)(2)	Failure to apply seal and signature to written reports when filed in compliance with §663.17(b).	Reprimand/100
§663.17(d)	Failure to mark, in a way that is traceable, all monuments; when practical.	Reprimand/100
§663.18(a)	Failure to apply surveyor's seal to all documents representing professional surveying.	Reprimand/100
§663.18(c)	When preparing preliminary documents, failure to identify the purpose of the document, the surveyor of record and the surveyor's registration number, and the release date. Failure to note the following statement in the signature space: "Preliminary, this document shall not be recorded for any purpose."	Reprimand/1500
§663.18(d)	Failure to certify only to factual information that the surveyor has personal knowledge of or to information within his professional expertise.	Reprimand/1500
§663.19(1)	Failure to delineate the relationship between record monuments and the location of boundaries surveyed. Failure to show such relationship on the survey plat, if a plat is prepared, and/or separate report and failure to recite such in the description with the appropriate record referenced thereon and therein.	Reprimand/1500
§663.19(2)	Failure to provide a definite and unambiguous identification of the location of boundaries and describe all pertinent monuments found or placed for descriptions prepared for defining boundaries.	Reprimand/1500

Citation	Violation	Sanction on a First Offense
§663.19(3)	Failure to prepare the plat to a convenient scale and provide a definite and unambiguous representation of the location of the surveyed land according to its record description.	Reprimand/1500
§663.19(3)(A) and (B)	Where material discrepancies are found between the record and conditions discovered, failure to apprise the client with a specific reference to discrepancy on the plat or a report of survey or other written notice.	Reprimand/1500
§663.19(4)	Failure to reference courses by notation upon the survey plat to an identifiable line for directional control.	Reprimand/1500
§663.19(5)	Failure to note the firm name, surveyor's name, address, and phone number of the land surveyor responsible for the land survey, his/her official seal, his/her original signature and date surveyed on the plat.	Reprimand/1500
§663.19(6)	Failure to note, upon the survey plat, which boundary monuments were found or placed by the surveyor and failure to note controlling monuments to which the survey may be referenced.	Reprimand/1500
§663.19(7)	Failure to cite a reference on the plat to the record instrument that defines the location of adjoining boundaries.	Reprimand/1500
§663.19(9)	If any report consists of more than one part, failure to note the existence of the other part or parts.	Reprimand/1500
§663.20(a)(1)	Failure of the registrant to notify the Board in writing within 90 days of any felony or misdemeanor conviction.	Reprimand/1500
§663.20(a)(2)	Failure of an applicant to state if he/she has ever been convicted of a felony or misdemeanor.	Application Rejected Revocation
§663.20(a)(3)	Failure of the registrant/applicant to provide a summary of the conviction in sufficient detail to allow the Board to determine if it is applicable to the practice of land surveying.	Application Rejected Revocation
§663.21(1)	Falsifying the recipient or purpose of a metes and bounds description when preparing a description for a Political Subdivision.	Reprimand/1500
§663.21(2)	Preparing a description for a Political Subdivision that is ambiguous and non-locatable on the ground by ordinary surveying procedures.	Reprimand/1500
§663.21(3)	Failure to place and describe record monuments or physical monuments called for in the description prepared for a Political Subdivision.	Reprimand/1500
§663.21(4)	Failure to perform an on the ground survey for any course and distance recited in the description when such is not referenced in a recited record.	Reprimand/1500
§663.21(5)	Failure to place the required notation on descriptions prepared for Political Subdivisions.	Reprimand/1500

Figure: 43 TAC §18.16(a)

Type of Vehicle	Minimum Insurance Level
1. Household [~~Tow trucks and household~~] goods carriers (gross vehicle weight less than 26,000 lbs.).	$300,000
2. Buses designed or used to transport more than 15 passengers (including the driver), but fewer than 26 passengers (not including the driver).	$500,000
3. Commercial motor vehicles which are buses with a seating capacity of 15 passengers or fewer (including the driver) operated by a foreign motor carrier and foreign motor private carrier as defined in 49 U.S.C. [~~USC~~] §13102.	$1,500,000
4. Buses designed or used to transport 26 passengers or more (not including the driver).	$5,000,000
5. Commercial school buses, regardless of the passenger capacity as described in Transportation Code, §643.1015.	$500,000
6. Commercial motor vehicles that are buses with a seating capacity of 16 passengers or more (including the driver) operated by a foreign motor carrier or foreign motor private carrier as defined in 49 U.S.C. [~~USC~~] §13102.	$5,000,000
7. Farm trucks (gross vehicle weight 48,000 lbs. or more).	$500,000
8. Commercial motor vehicles (gross vehicle weight in excess of 26,000 lbs.)[~~, including tow trucks~~].	$500,000
9. Commercial motor vehicles, as defined in 49 C.F.R. [~~CFR~~] §390.5, operated by a foreign motor carrier or foreign motor private carrier as defined in 49 U.S.C. [~~USC~~] §13102.	$750,000
10. Commercial motor vehicles - Oil listed in 49 C.F.R. [~~CFR~~] §172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 C.F.R. [~~CFR~~] §171.8 and listed in 49 C.F.R. [~~CFR~~] §172.101, but not mentioned in item 10 of this table.	$1,000,000
11. Commercial motor vehicles – Hazardous substances, as defined in 49 C.F.R. [~~CFR~~] §171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or any quantity of Division 1.1, 1.2, and 1.3 materials, any quantity of Division 2.3, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 C.F.R. [~~CFR~~] §173.403.	$5,000,000

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Notice Regarding Percentage Volume of Texas Grapes Required by Texas Alcoholic Beverage Code, Section 16.011

Texas Agriculture Code, Section 12.039, provides that the commissioner of agriculture may reduce the percentage by volume of fermented juice of Texas grapes, or other fruit, that wine produced by wineries located in dry areas of Texas must contain under Texas Alcoholic Beverage Code, Section 16.011. The commissioner has received a report from the Texas Wine Marketing Research Institute for the 2007 Texas wine grape crop year, as provided for in Section 12.039, and upon review of that report and other information provided to the Commissioner regarding the 2007 wine grape crop, has determined that there is sufficient information to reduce from 75% to 30% the percentage of Texas-grown grapes and fruit that is required by Section 16.011 to be in wine produced by wineries located in dry areas of Texas for the 2008 calendar year.

In accordance with Section 12.039(g), if a winery in a dry area of Texas finds, even after the commissioner's reduction of the percentage volume requirement to 30%, that a particular variety of grape or other fruit is not available to a level sufficient for the winery to meet the winery's estimated 2008 production for the relevant year, this winery may request that the commissioner further reduce the percentage requirement in Section 16.011. The winery must submit documentation to the commissioner substantiating that the winery has not been able to acquire those grapes or other fruit grown in this state in an amount sufficient to meet the winery's production needs and to comply with requirements of Section 16.011, as adjusted by the commissioner. If the commissioner determines that there is not a sufficient quantity of that variety of grapes or other fruit grown in this state to meet the needs of that winery, the commissioner may further reduce the percentage requirement for wine bottled during the remainder of the calendar year that contains that variety of grape or fruit for that winery.

TRD-200706482
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: December 19, 2007

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Office of the Attorney General

Request for Applications (RFA) for the Sexual Assault Prevention and Crisis Services (SAPCS - Federal) Program

The Crime Victim Services Division (CVSD) of the Office of the Attorney General (OAG) is soliciting applications from Statewide Programs to utilize SAPCS-Federal funds for the following focus areas:

1. Build capacity of SAPCS-Federal grantees to engage in primary prevention planning, implementation, and evaluation by providing technical assistance and training throughout Texas as part of the Primary Prevention Capacity Building Team.

2. Provide in-depth technical assistance to SAPCS-Federal grantees in developing community based, culturally relevant primary prevention strategies, activities, materials, and evaluation tools in line with priority targets set by the Primary Prevention Planning Committee (PPPC).

3. Develop primary prevention programming specifically for underserved populations and/or programming that engages and organizes men in primary prevention efforts and provide training and technical assistance statewide on these issues.

4. Support and assist the OAG with the planning and implementation of a FY08 OAG one or two-day conference on primary prevention, including workshops provided by national experts.

Applicants must submit only one application which must include all four focus areas listed above.

Applicable Funding Source: The source of federal funds includes the Federal Department of Health and Human Services, Preventative Health and Health Services Block Grant, Catalog of Federal Domestic Assistance (CFDA) Number 93.991 and Injury Prevention and Control Research and State and Community Based Programs, CFDA Number 93.136. The federal funds are used for grant contracts supporting the prevention of sexual assault or sexual violence. All funding is contingent upon the appropriation of funds by the United States Congress and the Texas Legislature. The OAG makes no commitment that an application, once submitted, or a grant, once funded, will receive subsequent funding.

Eligibility Requirements:

Eligible applicants are: local units of government, excluding law enforcement agencies and prosecutor's offices; non-profit agencies with 26.U.S.C. §501(c)(3) status; and state agencies. Only programs which would qualify as "statewide" by the below criteria are eligible to apply. A statewide program is an entity that actively offers or provides services in six or more Council of Government "COG" regions. To be eligible for special project funding, a statewide program must show that it supports efforts to maintain or expand existing services offered by local sexual assault programs; improve sexual assault services to survivors; or other activities consistent with Texas Government Code, Chapter 420.

The OAG will initially screen each application for eligibility. Applications will be deemed ineligible if the application is submitted by an ineligible applicant; the application is not filed in the manner and form required by the RFA or the Application Kit; the application is filed after the deadline established in the RFA or the Application Kit; or the application does not meet other requirements as stated in the RFA or the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's official agency Web site at http://www.oag.state.tx.us/victims/grants2008.shtml. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to this site regularly.

Deadlines and Filing Instructions for the Grant Application:

Refer to the Application Kit for the complete application requirements and instructions.

Deadline: The applicant must submit its application, including all required attachments, to the OAG and the OAG must receive the submitted application and all required attachments by 5:00 p.m. CST January 15, 2008 to be considered timely filed.

Filing Instructions: To meet the deadline, the Applicant must submit paper (hard copies) documents. No e-mail submission is required. An Application will be considered filed when the OAG receives the paper (hard copies) in the following way by the required deadline:

Paper (hard copies) - Via Next Day Air Overnight delivery service (Federal Express, United Parcel Service, DHL or Lone Star):

The Applicant must submit **one original and three copies of the complete Application including attachments.**

The complete Application including attachments must be sent to the following address:

CVS GRANTS APPLICATIONS - MC 005

OFFICE OF THE ATTORNEY GENERAL

300 W 15TH ST RM 102

AUSTIN, TX 78701-1649

The original application including attachments and three hard copies must be received by 5:00 p.m. CST January 15, 2008.

The OAG will not consider an Application if it is not filed by the due date, 5:00 pm CST January 15, 2008.

Minimum and Maximum Amounts of Funding Available: The minimum amount of funding statewide programs may apply for is $20,000 per fiscal year, and the maximum amounts are $230,000 for FY08 and $200,000 for FY09.

The amount of an award is determined solely by the OAG. The OAG may award grants at amounts above or below the established funding levels and is not obligated to fund a grant at the amount requested.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to eighteen months from March 1, 2008 through August 31, 2009, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements for SAPCS-Federal projects.

Volunteer Requirements: All SAPCS-Federal projects must have a volunteer component. Specific requirements for the volunteer component will be stated in the Application Kit.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the organization's capacity, infrastructure and experience, and on the proposed project activities and budget.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of overtime, dues, or lobbying; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit. Additional prohibitions include, but are not limited to, using grant funds for: construction and/or renovation; development of major software applications; direct counseling, treatment, or advocacy services to victims or perpetrators of sexual violence; media or awareness campaigns that exclusively promote awareness of where to receive victim services; and research.

OAG Contact Person: If additional information is needed, contact Jennifer McShane at CVSGrantsApplications@oag.state.tx.us or (512) 936-1278.

TRD-200706437
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 18, 2007

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Comptroller of Public Accounts

Notice of Contract Award

Pursuant to Chapter 403 and Chapter 2254, Subchapter B, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the following contract award:

The notice of request for proposals was published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7539) (RFP #181a).

The contractor will provide consulting and technical advice and assistance to the Comptroller and the Texas Prepaid Higher Education Tuition Board in the evaluation and selection of the new Texas Tomorrow Fund II Plan Manager.

The contract was awarded to AKF Consulting LLC. The total amount of the contract is not to exceed $50,000.00. The term of the contract is November 27, 2007 through December 31, 2008, with option to renew for two additional one year terms, one year at a time.

TRD-200706396
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 17, 2007

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Notice of No Contract Award

The Texas Comptroller of Public Accounts (Comptroller) announces this notice of no contract award in connection with the Request for Qualifications (RFQ) #177d for Independent Examining Services to solicit independent tax examiners for hotel occupancy tax pursuant to Chapter 111, §111.0045 Texas Tax Code and the RFQ.

The notice of issuance of this RFQ #177d was posted on the Electronic State Business Daily on October 19, 2007 and published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7536).

TRD-200706349
Pamela G. Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: December 13, 2007

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/24/07 - 12/30/07 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/24/07 - 12/30/07 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 01/01/08 - 01/31/08 is 7.25% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 01/01/08 - 01/31/08 is 7.25% for Commercial over $250,000.

[1]Credit for personal, family, or household use.

[2]Credit for business, commercial, investment, or other similar purpose.

TRD-200706427
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 18, 2007

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Court of Criminal Appeals

Miscellaneous Order Concerning Hazardous Papers

In the Court of Criminal Appeals of Texas

Misc. Docket No. 07-101

APPROVAL OF MISCELLANEOUS ORDER 07-101 CONCERNING HAZARDOUS PAPERS

ORDERED that:

1. Miscellaneous Order 07-101 concerning hazardous papers is adopted.

2. This Order takes effect December 17, 2007.

3. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Final Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

SIGNED AND ENTERED this 17th day of December, 2007.

Sharon Keller, Presiding Judge

Lawrence E. Meyers, Judge

Tom Price, Judge

Paul Womack, Judge

Cheryl Johnson, Judge

Michael Keasler, Judge

Barbara Hervey, Judge

Charles Holcomb, Judge

Cathy Cochran, Judge

Miscellaneous Order No. 07-101

Hazardous Papers or Items Sent to the Court of Criminal Appeals

(a) Persons shall not send or deliver to this Court (including the Clerk of the Court, any judge, or any member of the staff of the Court) papers or items that constitute a health hazard as defined in Section (b).

(b) The Clerk of the Court is authorized to routinely and immediately dispose of, without seeking a judge's permission, any papers or items sent or delivered to this Court that are smeared with or contain corrosive or dangerous chemicals, blood, food, feces, urine, or other bodily fluids. Such items constitute a health hazard to Court employees and shall be disposed of by the Clerk for that reason.

(c) The Clerk of the Court shall maintain a written log of items that have been disposed of under this rule. The log shall contain all available information concerning the name, address, and identification numbers of the person who sent the offending material, and a brief description of the item disposed of.

(d) The Clerk of the Court shall also notify the sender and, if applicable, the appropriate supervising official of any prison or jail in which a sender-prisoner is held, that the item was destroyed and that sanctions may be imposed if the prisoner continues to send or deliver papers or items in violation of Section (b) of this Rule.

TRD-200706462
Louise Pearson
Clerk of the Court
Court of Criminal Appeals
Filed: December 19, 2007

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Credit Union Department

Applications for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application was received from Pegasus Credit Union (Dallas) seeking approval to merge with First Aviation Federal Credit Union (Dallas). Pegasus Credit Union will be the surviving credit union.

An application was received from Texans Credit Union (Richardson) seeking approval to merge with Central Dallas Federal Credit Union (Dallas). Texans Credit Union will be the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200706466
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 19, 2007

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from First Service Credit Union, Houston, Texas (#1) to expand its field of membership. The proposal would per-

mit employees of GoDISH.com who work in or are paid from Houston, Texas, to be eligible for membership in the credit union.

An application was received from First Service Credit Union, Houston, Texas (#2) to expand its field of membership. The proposal would permit employees of Green, Tweed & Company who work in or are paid from Houston, Texas, to be eligible for membership in the credit union.

An application was received from Members Choice Credit Union, Houston, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school or worship in and businesses located within a 10-mile radius of the following branches of Members Choice Credit Union: 8951 S. Fry Road, Katy, TX 77494, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200706465
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 19, 2007

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership - Approved

Qualtrust Credit Union, Irving, Texas (#1) - See *Texas Register* issue dated June 29, 2007.

Qualtrust Credit Union, Irving, Texas (#2) - See *Texas Register* issue dated June 29, 2007.

TruWest Credit Union, Scottsdale, Arizona - See *Texas Register* issue dated August 31, 2007.

TRD-200706467
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 19, 2007

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Texas Education Agency

Request for Early Reading Diagnostic Instruments

Description. The Texas Education Agency (TEA) is notifying publishers that early reading diagnostic instruments for Kindergarten, Grade 1, and Grade 2 may be submitted for review. Texas Education Code (TEC), §28.006, authorizes the commissioner of education to develop recommendations for school districts to administer early reading instruments to diagnose student reading skill and comprehension development.

In accordance with TEC, §28.006(b), the commissioner of education shall adopt a list of early reading instruments that school districts may use to diagnose reading skill and comprehension development. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress, and be used to identify students at risk for dyslexia or other reading difficulties. The list of reading instruments adopted under TEC, §28.006(b), must also provide for diagnosing the reading development and comprehension of students participating in a program under TEC, Chapter 29, Subchapter B (relating to Bilingual Education and Special Language Programs).

Program Requirements. Since the 1998 - 1999 school year, school districts have been required to administer early reading instruments. Results from the early reading instruments are used to inform instruction and place students at risk for reading difficulties, including dyslexia, in Accelerated Reading Instruction intervention programs. Results from these early reading instruments must be reported to the commissioner of education, the local school board, and the parent and/or guardian of students tested. The list of early reading instruments will be made available so that school districts and open-enrollment charter schools may order instruments for the 2008 - 2009 school year. Instruments selected for the commissioner's list will remain on the list for four years unless the approved test is no longer available from the publisher or the publisher submits an updated version of the instrument prior to the end of the four-year approval cycle.

Early reading instruments selected for the 2007 - 2008 *Commissioner's List of Early Reading Instruments* do not need to be resubmitted this year, but they must be resubmitted for the 2009 - 2010 approval cycle.

Due to continued budgetary limitations, a $5 per student per year cost cap remains on each complete Test Option on the 2008 - 2009 *Commissioner's List of Early Reading Instruments*. For example, if Option G requires two instruments in order to assess all required domains at a grade level, then the combination of those two instruments will be state funded at no more than $5 per student. For the 2008 - 2009 school year, school districts and open-enrollment charter schools will purchase early reading instruments directly from the publisher/vendor unless the test is published by the TEA. If the cost of the Test Option exceeds the $5 per student limit established, the state will reimburse the school district or open-enrollment charter school at the limit established. The school district or open-enrollment charter school is responsible for the remainder of the cost of the Test Option.

Selection Criteria. Publishers will be responsible for submitting tests that they wish to have considered for inclusion on the 2008 - 2009 *Commissioner's List of Early Reading Instruments*. All tests submitted for review must be based on scientific research and must be submitted with evidence of reliability and validity for assessing key reading domains and identifying children at risk of reading failure, including the identification of children with dyslexia. Submitted evidence must demonstrate that the test meets the state criteria for reliability and validity. Instruments will be evaluated in terms of validity, reliability, cost-effectiveness, and ease of administration/implementation by the classroom teacher. Consideration will also be given to the number of domains covered by the test and the number of additional tests that would need to be purchased by schools in order to cover all required domains. Reading instruments (English and Spanish) submitted for review must address at least one of the following five domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; (4) oral reading accuracy; and (5) comprehension of text, as appropriate for Kindergarten, Grade 1, and Grade 2. Tests submitted for use by Reading First schools may also assess vocabulary and fluency. As in previous years, it may be necessary to use a combination

of instruments to form a Test Option to assess all required domains. The criteria used to select instruments for the 2008 - 2009 school year is available through the Division of Curriculum at the Texas Education Agency, (512) 463-9581.

Proposals must be submitted to Dr. David Francis; Texas Institute for Measurement, Evaluation, and Statistics; 100 TLCC Annex; Houston, Texas 77204-6022 by 5:00 p.m. (Central Time), Friday, January 18, 2008, to be considered for inclusion on the 2008 - 2009 *Commissioner's List of Early Reading Instruments*.

TRD-200706454
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 19, 2007

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Request for Grade 3 Early Reading Diagnostic Instruments

Description. The Texas Education Agency (TEA) is notifying publishers that early reading diagnostic instruments for the 2008 - 2009 *List of Grade 3 Early Reading Instruments* may be submitted for review. P.L. 107-110, Title I, Part B, Subpart 1 of Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001, CFDA #84.357, authorizes the commissioner of education to develop recommendations for school districts to administer early reading instruments to diagnose student reading skill and comprehension development.

Under P.L. 107-110, Title I, Part B, Subpart 1 of Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001, CFDA #84.357, the TEA shall adopt a list of Grade 3 early reading instruments that school districts and open-enrollment charter schools may use to diagnose reading skill and comprehension development. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress, and be used to identify students at risk for dyslexia or other reading difficulties. The list of reading instruments must also provide for diagnosing the reading development and comprehension of students participating in a program under Texas Education Code, Chapter 29, Subchapter B (relating to Bilingual Education and Special Language Programs).

Program Requirements. Since May 2003, school districts and open-enrollment charter schools participating in Reading First have been required to administer Grade 3 early reading instruments. Results from the early reading instruments are used to inform instruction and place students at risk for reading difficulties, including dyslexia, in Accelerated Reading Instruction intervention programs. The list of early reading instruments will be made available so that school districts and open-enrollment charter schools may order instruments for the 2008 - 2009 school year.

Instruments selected for the 2008 - 2009 *List of Grade 3 Early Reading Instruments* will remain on the list for four years unless the approved test is no longer available from the publisher or the publisher submits an updated version of the instrument prior to the end of the four-year approval cycle. Those publishers selected for the 2005 - 2006 *List of Grade 3 Early Reading Instruments* were informed that the list would remain in effect only through the 2005 - 2006 and 2006 - 2007 school years.

Selection Criteria. Publishers will be responsible for submitting tests that they wish to have considered for inclusion on the 2008 - 2009 *List of Grade 3 Early Reading Instruments*. All tests submitted for review must be based on scientific research and must meet the state criteria for reliability and validity.

Instruments will be evaluated in terms of validity, reliability, cost-effectiveness, and ease of administration/implementation by the classroom teacher. Reading instruments (English and Spanish) submitted for review must address at least one of the following four domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; and (4) oral reading accuracy and comprehension of text, as appropriate for Grade 3.

Proposals must be submitted to Dr. David Francis; Texas Institute for Measurement, Evaluation, and Statistics; 100 TLCC Annex; Houston, Texas 77204-6022 by 5:00 p.m. (Central Time), Friday, January 18, 2008, to be considered for inclusion on the 2008 - 2009 *List of Grade 3 Early Reading Instruments*.

TRD-200706455
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 19, 2007

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 28, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 28, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: AHZ, LLC, MZH, LLC, ZAO, LLC, and Patrinely Group, LLC; DOCKET NUMBER: 2007-1626-EAQ-E; IDENTIFIER: RN105282206; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: commercial development site; RULE VIOLATED: 30 Texas Administrative Code (TAC) §213.4(a)(1), by allegedly having conducted regulated activities on the Edwards Aquifer Recharge Zone prior to receiving TCEQ approval; PENALTY: $10,500; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817)

588-5800; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: ATCO-Valley Plaza, LLC; DOCKET NUMBER: 2007-1379-IWD-E; IDENTIFIER: RN102182474; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a), by failing to maintain a Texas Land Application Permit as required for the disposal of wastewater; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Austin Equipment Company, LC dba Superior Crushed Stone; DOCKET NUMBER: 2007-1371-EAQ-E; IDENTIFIER: RN104543780; LOCATION: Williamson County, Texas; TYPE OF FACILITY: stone quarry operation; RULE VIOLATED: 30 TAC §213.4(k) and Edwards Aquifer Protection Program Identification Number 50222.01, Standard Conditions 3, by failing to maintain a complete copy of the Edwards Aquifer Water Pollution Abatement Plan (WPAP) on site; and 30 TAC §213.4(j)(2), by failing to submit and receive approval of modifications to an Edwards Aquifer WPAP prior to performing a regulated activity; PENALTY: $3,410; Supplemental Environmental Project (SEP) offset amount of $1,364 applied to Keep Texas Beautiful; ENFORCEMENT COORDINATOR: Andrew Hunt, (512) 239-1203; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: Brazoria County; DOCKET NUMBER: 2007-1949-PST-E; IDENTIFIER: RN102217312; LOCATION: Brazoria County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c), by failing to submit initial/renewal underground storage tank (UST) registration and self-certification forms; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: C & L Services LP; DOCKET NUMBER: 2007-1950-PST-E; IDENTIFIER: RN102822319; LOCATION: Cleburne, Johnson County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2007-1079-AIR-E; IDENTIFIER: RN100825249; LOCATION: Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.715(a), Flexible Air Permit Number 22690, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1)(B) and (b) and §101.211(a) and THSC, §382.085(b), by failing to submit an initial notification or a final report for an unplanned maintenance activity to replace a faulty compressor diaphragm; PENALTY: $38,684; Supplemental Environmental Project (SEP) offset amount of $15,474 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2007-1419-AIR-E; IDENTIFIER: RN100825249; LOCATION: Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.715(a), Flexible Air Permit Number 22690, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b) and THSC, §382.085(b), by failing to submit a timely final report for an emissions event; PENALTY: $10,234; Supplemental Environmental Project (SEP) offset amount of $4,094 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Child Inc.; DOCKET NUMBER: 2007-1474-PWS-E; IDENTIFIER: RN105284301; LOCATION: Blanco County, Texas; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.39(m), by failing to provide written notification of the reactivation of an existing PWS system; PENALTY: $100; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(9) COMPANY: Clifco Construction, Ltd.; DOCKET NUMBER: 2007-1313-MLM-E; IDENTIFIER: RN105295208; LOCATION: Magnolia, Montgomery County, Texas; TYPE OF FACILITY: sand mining operation; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; and 30 TAC §297.11 and the Code, §11.121, by failing to obtain rights to divert, store, impound, take, or use water at the site from an identified United States Geological Survey intermittent creek; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Lindsey Jones, (512) 239-4930; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2007-1194-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(2) and §122.143(4), 40 CFR §63.152(c)(2)(i), Federal Operating Permit (FOP) Number O-01626, Special Terms and Conditions (STC) 1A, and THSC, §382.085(b), by failing to maintain the regenerative thermal oxidizer (RTO) at or above the required 1,500 degrees Fahrenheit; 30 TAC §§101.20(1) and (2), 116.115(c), and 122.143(4), 40 CFR §§60.18(c)(2), 63.11(b)(5), and 63.113(a)(1)(i), New Source Review (NSR) Permit Numbers 5920A, SC 4B, 7467A, SC 4, 18142, SC 15, 22086, SC 9, and 30513, SC 5, FOP Number O-01626, STC 1A and 19, and THSC, §382.085(b), by failing to maintain a continuous pilot light on four flares; 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 5920A, SC 1 and 9, FOP Number O-01626, STC 1A and 19, and THSC, §382.085(b), by failing to comply with the sulfur recovery unit tail gas incinerator for sulfur dioxide (SO_2); 30 TAC §§101.20(1) and (2), 116.115(c), and 122.143(4), 40 CFR §60.103(a) and §63.1565(a)(1)(i), NSR Permit Numbers 5920A, SC 1 and 23, and 30513, SC 1, FOP Number O-01626, STC 1A and 19, and THSC, §382.085(b), by failing to comply with the carbon monoxide (CO) emission rates on the heavy oil cracking (HOC) unit regenerator stack, vacuum unit heater, coke heaters, and continuous catalytic regeneration (CCR) furnace; 30 TAC §§101.20(1), 116.115(c), and 122.143(4), 40 CFR §60.104(a)(1), NSR Permit Number 5920A, SC 3, FOP Number O-01626, STC 19, and THSC, §382.085(b), by failing to comply with the average fuel gas hydrogen sulfide maximum concentration limit of 160 parts per million by volume; 30 TAC §101.20(2) and §122.143(4), 40 CFR §63.1567(a)(2), FOP Number O-01626, STC 1A, and THSC, §382.085(b), by failing to maintain the pH level; and 30 TAC §116.115(c) and §116.615(2), NSR Permit Number 7467A, SC 1, Standard Permit Number 75864, General Condition 8, and THSC, §382.085(b), by failing to control unauthorized emissions; PENALTY: $228,900; Supplemental Environmental Project (SEP)

offset amount of $114,450 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: City of Corpus Christi; DOCKET NUMBER: 2007-1409-MLM-E; IDENTIFIER: RN101385151; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(l), by failing to flush all dead-end mains at monthly intervals; 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a chloramine residual of at least 0.5 milligrams per liter (mg/L) throughout the distribution system at all times; 30 TAC §290.110(c)(1)(B), by failing to meet disinfection requirements as described by the system's contact time study; 30 TAC §290.42(d)(5), by failing to provide a flow measuring device; 30 TAC §290.43(c)(4), by failing to equip the ground storage tank with a water level indicator; 30 TAC §290.43(c)(5), by failing to ensure the ground storage tank's inlet and outlet connections are properly located so as to prevent short-circuiting or the stagnation of water; 30 TAC §290.46(m)(4), by failing to maintain all treatment units, storage and pressure maintenance facilities, distribution lines, and related appurtenances in a watertight condition; 30 TAC §290.109(f)(1)(A) and THSC, §341.0315(c), by exceeding the maximum contaminant level for fecal coliform bacteria; 30 TAC §290.46(q)(l) and §290.122(a)(2)(A), by failing to issue a boil water notice; 30 TAC §290.110(f)(1), by failing to obtain all samples used to determine compliance at sampling sites designated in the monitoring plan; 30 TAC §290.42(d)(2)(C), by failing to provide an air gap or an acceptable backflow prevention device for the mack-up water supply line to the chlorinator; and 30 TAC §290.46(r), by failing to operate the system to maintain a minimum pressure of 35 pounds per square inch (psi) throughout the distribution system; and the Code, §26.121, by failing to prevent an unauthorized discharge of filtered backwash wastewater; PENALTY: $11,076; Supplemental Environmental Project (SEP) offset amount of $11,076 applied to Coastal Bend Bays and Estuaries Program, Inc.; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (210) 490-3096; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(12) COMPANY: Dixie Chemical Company, Inc.; DOCKET NUMBER: 2007-1542-AIR-E; IDENTIFIER: RN100218486; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), TCEQ Air Permit Number 18342, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,300; Supplemental Environmental Project (SEP) offset amount of $1,320 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Kenneth Ray Cavitt dba Don's Wrecker Service; DOCKET NUMBER: 2007-1350-PST-E; IDENTIFIER: RN102021912; LOCATION: Bryan, Brazos County, Texas; TYPE OF FACILITY: automobile towing service; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, two USTs; and 30 TAC §334.54(b), by failing to maintain all piping, pump, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: $5,250; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(14) COMPANY: Earth Haulers, Inc.; DOCKET NUMBER: 2007-1207-WQ-E; IDENTIFIER: RN105224547; LOCATION: Reno, Parker County, Texas; TYPE OF FACILITY: construction sand mining site; RULE VIOLATED: the Code, §26.121(a), by failing to prevent unauthorized discharges of sediment; and 30 TAC §205.6 and the Code, §5.702, by failing to pay outstanding general permit storm water fees and associated late fees; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: ELG Metals, Inc.; DOCKET NUMBER: 2007-1457-IWD-E; IDENTIFIER: RN102185733; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: stainless steel scrap metal processing; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0003324000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total copper, total lead, and total nickel; PENALTY: $5,700; Supplemental Environmental Project (SEP) offset amount of $2,280 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Enterprise Products Operating LLC; DOCKET NUMBER: 2007-1162-AIR-E; IDENTIFIER: RN102323268; LOCATION: Mont Belvieu, Chambers County, Texas; TYPE OF FACILITY: natural gas liquids processing plant; RULE VIOLATED: 30 TAC §116.116(a)(1) and (b)(1)(C), NSR Permit Number 8707 Application Representations, and THSC, §382.085(b), by failing to maintain an emission rate below permit application representations of 1.12 pounds per hour (lbs/hr) of volatile organic compounds (VOCs); 30 TAC §116.116(a)(1) and (b)(1)(C), NSR Permit Number 6798 Application Representations, and THSC, §382.085(b), by failing to maintain an emission rate below permit application representations of 1.61 lbs/hr of VOCs; and 30 TAC §116.115(c) and §116.116(a)(1) and (b)(1)(C), NSR Permit Number 5581 Application Representations and SC 1, and THSC, §382.085(b), by failing to maintain an emission rate below permitted limits of 0.13 lbs/hr; PENALTY: $541,450; Supplemental Environmental Project (SEP) offset amount of $270,725 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: First County, Inc. dba Texan Food Mart; DOCKET NUMBER: 2007-1351-PST-E; IDENTIFIER: RN104793286; LOCATION: Willis, Montgomery County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $4,470; ENFORCEMENT COORDINATOR: Philip DeFrancesco, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: City of Graford; DOCKET NUMBER: 2007-1368-MWD-E; IDENTIFIER: RN101917813; LOCATION: Palo Pinto County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010722001 Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with

permitted effluent limits for five-day biochemical oxygen demand, pH, dissolved oxygen, and total suspended solids; PENALTY: $11,840; Supplemental Environmental Project (SEP) offset amount of $9,472 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Harmony Independent School District; DOCKET NUMBER: 2007-1556-MWD-E; IDENTIFIER: RN101720837; LOCATION: Upshur County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013050001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limitations for total suspended solids; PENALTY: $4,560; ENFORCEMENT COORDINATOR: Andrew Hunt, (512) 239-1203; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(20) COMPANY: Roger Allen Lund dba Hickory Ridge Mobile Home Park; DOCKET NUMBER: 2007-1453-MWD-E; IDENTIFIER: RN102078953; LOCATION: Palestine, Anderson County, Texas; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.65(a) and §305.125(2) and the Code, §26.121(a), by failing to maintain authorization to discharge wastewater; PENALTY: $12,000; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3048; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(21) COMPANY: Ezekiel L. Holloway dba Hill River Country Estates; DOCKET NUMBER: 2007-1484-PWS-E; IDENTIFIER: RN101195212; LOCATION: Center Point, Kerr County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(i) and THSC, §341.0315(c), by failing to provide a well production capacity of 0.6 gallons per minute per connection; and 30 TAC §290.121(a), by failing to maintain an up-to-date chemical and microbiological monitoring plan; PENALTY: $856; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(22) COMPANY: INEOS Polymers, Inc.; DOCKET NUMBER: 2007-1486-AIR-E; IDENTIFIER: RN102537289; LOCATION: La Porte, Harris County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1), FOP Number O-02570, General Terms and Conditions, and THSC, §382.085(b), by failing to submit the annual compliance certification; PENALTY: $3,725; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: ISP Synthetic Elastomers LP; DOCKET NUMBER: 2007-1668-AIR-E; IDENTIFIER: RN100224799; LOCATION: Port Neches, Jefferson County, Texas; TYPE OF FACILITY: butadiene rubber manufacturing; RULE VIOLATED: 30 TAC §101.201(a)(2)(H) and (I) and §122.143(4), FOP Number O-01224, General Terms and Conditions and SC 2F, and THSC, §382.085(b), by failing to properly notify the TCEQ Regional Office of a reportable emissions event; and 30 TAC §116.115(b)(2)(F) and §122.143(4), FOP Number O-01224, General Terms and Conditions and SC 11, and THSC, §382.085(b), by failing to prevent unauthorized emissions of 11 lbs of butadiene and ten lbs of styrene; PENALTY: $5,122; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(24) COMPANY: James & Vickie Enterprises, Inc. dba James Stuart Construction; DOCKET NUMBER: 2007-1495-MSW-E; IDENTIFIER: RN105324875; LOCATION: Lumberton, Hardin County, Texas; TYPE OF FACILITY: construction company; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the transportation and disposal of municipal solid waste at the site; PENALTY: $2,156; ENFORCEMENT COORDINATOR: John Shelton, (512) 239-2563; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: LANXESS Corporation; DOCKET NUMBER: 2007-1429-AIR-E; IDENTIFIER: RN104680871; LOCATION: Baytown, Chambers County, Texas; TYPE OF FACILITY: manufacturing plant for basic and fine chemicals; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1), FOP Number O-02105 General Terms and Conditions, and THSC, §382.085(b), by failing to submit the annual permit compliance; PENALTY: $3,050; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Leggett Water Supply Corporation; DOCKET NUMBER: 2007-1113-PWS-E; IDENTIFIER: RN101454130; LOCATION: Livingston, Polk County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to secure sanitary control easements; 30 TAC §290.46(f)(3)(A)(i)(II), by failing to properly maintain and annotate the amount of chemicals used each day on the water works operation; 30 TAC §290.46(m), by failing to initiate a maintenance program to maintain the general appearance of the system's facilities and equipment; 30 TAC §290.44(h)(4), by failing to have backflow prevention assemblies tested and certified; 30 TAC §290.46(v), by failing to ensure that all water system electrical wiring is securely installed in compliance with a local or national electrical code; 30 TAC §290.121(a) and (b), by failing to keep on file and make available for commission review an up-to-date chemical and microbiological monitoring plan; 30 TAC §290.46(u), by failing to plug and seal PWS abandoned wells; 30 TAC §290.43(c)(3) and (c)(8), by failing to maintain the facility's storage tanks in strict accordance with current America Water Works Association design standards; 30 TAC §290.41(c)(3)(B), by failing to provide a well casing that extends a minimum of 18 inches above the elevation of the finished floor of the pump house or natural ground surface; 30 TAC §290.46(f)(3)(E)(iv) and §290.46(j), by failing to conduct customer service inspections; 30 TAC §290.42(e)(4)(A), by failing to provide a small bottle of fresh ammonia solution (or approved equal) for testing for chlorine leakage; 30 TAC §290.46(m)(1)(B), by failing to conduct an inspection of the interior of the pressure tank; and 30 TAC §290.41(c)(3)(O), by failing to provide an intruder-resistant fence; PENALTY: $4,830; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(27) COMPANY: Edward Longoria; DOCKET NUMBER: 2007-1948-WOC-E; IDENTIFIER: RN104009642; LOCATION: Lamb County, Texas; TYPE OF FACILITY: wastewater operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(28) COMPANY: Motiva Enterprises LLC; DOCKET NUMBER: 2007-1335-AIR-E; IDENTIFIER: RN100209451; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), NSR Flexible Permit Number 8404/PSD-TX-1062, SC Numbers 1

and 5, and THSC, §382.085(b), by failing to comply with permitted emissions limits; and 30 TAC §111.111(a)(1) and THSC, §382.085(b), by failing to comply with opacity limits; PENALTY: $24,700; Supplemental Environmental Project (SEP) offset amount of $9,880 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Clean School Buses; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(29) COMPANY: North Hamilton Hill Water Supply Corporation; DOCKET NUMBER: 2007-1491-PWS-E; IDENTIFIER: RN101177426; LOCATION: Robertson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(2), by failing to make operating records available to commission personnel for review upon request; and 30 TAC §290.45(f)(5) and THSC, §341.0315(c), by failing to meet the Agency's Minimum Water System Capacity Requirements for service pumping capacity; PENALTY: $535; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(30) COMPANY: Red River Authority of Texas; DOCKET NUMBER: 2007-1441-PWS-E; IDENTIFIER: RN101246221; LOCATION: Clay County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(b)(1) and (f)(4) and THSC, §341.0315(c), by failing to meet the requirements of the disinfection protocol used by the PWS for a period longer than four consecutive hours; PENALTY: $7,240; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(31) COMPANY: RFK Enterprises, Inc. dba Food Spot 4; DOCKET NUMBER: 2007-1452-PST-E; IDENTIFIER: RN102449352; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain records at the station ordinarily manned during business hours and make them immediately available for review; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II vapor recovery system (VRS) to an on-board refueling vapor recovery compatible system; and 30 TAC §115.242(3)(E) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition and free of defects; PENALTY: $1,940; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(32) COMPANY: Rochelle Water Supply Corporation; DOCKET NUMBER: 2007-1750-PWS-E; IDENTIFIER: RN101188290; LOCATION: Rochelle, McCulloch County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a free chlorine residual of 0.2 mg/L throughout the distribution system; PENALTY: $655; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7015, (915) 655-9479.

(33) COMPANY: Russell Wayne Carpenter dba Russell Carpenter Dairy; DOCKET NUMBER: 2007-1677-AGR-E; IDENTIFIER: RN102743192; LOCATION: Erath County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.31(a) and the Code, §26.121(a), by failing to prevent an unauthorized discharge of wastewater; PENALTY: $790; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6950, (817) 588-5800.

(34) COMPANY: Thurman Black dba Slo Pitch City; DOCKET NUMBER: 2007-1418-PWS-E; IDENTIFIER: RN102319415; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public drinking water system; RULE VIOLATED: 30 TAC §290.109(c)(A)(2)(i) and THSC, §341.033(d), by failing to collect routine water samples for bacteriological analysis; PENALTY: $1,370; ENFORCEMENT COORDINATOR: Christopher Keffer, (512) 239-5610; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(35) COMPANY: Larry Martindale dba Sundance Dairy; DOCKET NUMBER: 2007-1323-AGR-E; IDENTIFIER: RN104348412; LOCATION: Cooke County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.47(c)(1), by failing to properly operate the facility; and 30 TAC §321.31(a) and the Code, §26.121(a), by failing to prevent the unauthorized discharge of manure, litter, or wastewater from an animal feeding operation; PENALTY: $1,575; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(36) COMPANY: Targa Midstream Services Limited Partnership; DOCKET NUMBER: 2007-1477-AIR-E; IDENTIFIER: RN100214212; LOCATION: Galena Park, Harris County, Texas; TYPE OF FACILITY: storage terminal; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 5414, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to notify the TCEQ within the required 24 hours of discovery; PENALTY: $2,990; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(37) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2007-1311-PWS-E; IDENTIFIER: RN101209740; LOCATION: Plainview, Hale County, Texas; TYPE OF FACILITY: motorist rest stop with a public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2) and THSC, §341.0315(c), by failing to maintain a minimum disinfectant residual of 0.2 mg/L free chlorine throughout the distribution system; and 30 TAC §290.46(f)(2), by failing to provide water system records to commission personnel at the time of the investigation; PENALTY: $1,450; Supplemental Environmental Project (SEP) offset amount of $1,160 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(38) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2007-1628-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 46307, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1) and THSC, §382.085(b), by failing to report an emissions event within 24 hours after discovery; PENALTY: $13,566; Supplemental Environmental Project (SEP) offset amount of $5,426 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(39) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2007-1675-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 46307, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $6,500; Supplemental Environmental Project (SEP) offset amount of $2,600 applied to

Harris County Public Heath and Environmental Services-Pollution Control Division's Fourier Transform Infra Red (FTIR) Project; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(40) COMPANY: The Premcor Refining Group Inc.; DOCKET NUMBER: 2007-1358-AIR-E; IDENTIFIER: RN102584026; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a) and (c)(7), NSR Flexible Permit Number 6825A/PSD-TX-49, SC 5A, and THSC, §382.085(b), by failing to maintain compliance below the maximum allowable emission rate limits; and 30 TAC §101.20(3) and §116.715(a) and (c)(7), NSR Flexible Permit 6825A/PSD-TX-49, SC 5A, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $30,400; Supplemental Environmental Project (SEP) offset amount of $15,200 applied to South East Texas Regional Planning Commission-West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(41) COMPANY: United States Aluminum Corporation - Texas; DOCKET NUMBER: 2007-1266-AIR-E; IDENTIFIER: RN100981638; LOCATION: Waxahachie, Ellis County, Texas; TYPE OF FACILITY: aluminum processing plant; RULE VIOLATED: 30 TAC §116.115(c), NSR Permit Number 34802, SC Number 9A, and THSC, §382.085(b), by failing to maintain data of daily thinner and cleanup solvent usage; 30 TAC §116.115(b)(2)(F) and THSC, §382.085(b), by failing to comply with permitted emissions limits; and 30 TAC §116.115(c), NSR Permit Number 34802, SC Number 3A, and THSC, §382.085(b), by failing to route emissions from the coating line to the RTO; PENALTY: $27,900; Supplemental Environmental Project (SEP) offset amount of $11,160 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(42) COMPANY: United Structures of America, Inc.; DOCKET NUMBER: 2007-1575-AIR-E; IDENTIFIER: RN100219708; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: metal building manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), FOP Permit Number O-01107, General Terms and Conditions, and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $2,475; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(43) COMPANY: Valero Refining-Texas, L.P.; DOCKET NUMBER: 2007-1189-AIR-E; IDENTIFIER: RN100211663; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), Air Permit Numbers PSD-TX-1023M1 and 2937, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $8,800; Supplemental Environmental Project (SEP) offset amount of $3,520 applied to Texas A&M Corpus Christi-AutoCheck Program; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(44) COMPANY: Viridis Energy (Texas), LP; DOCKET NUMBER: 2007-1292-AIR-E; IDENTIFIER: RN102496130; LOCATION: Galveston County, Texas; TYPE OF FACILITY: landfill that converts waste into electricity; RULE VIOLATED: 30 TAC §117.340(a) and §117.9020(2)(A)(i) and THSC, §382.085(b), by failing to install totalizing fuel flow meters; and 30 TAC §122.145(2)(A), Air Permit Number 02538, General Conditions, and THSC, §382.085(b), by failing to report deviations regarding fuel flow meters on internal combustion engines; PENALTY: $4,387; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(45) COMPANY: City of West Tawakoni; DOCKET NUMBER: 2007-0535-PWS-E; IDENTIFIER: RN101423671; LOCATION: West Tawakoni, Hunt County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(3)(E)(iv), by failing to maintain copies of all customer service inspection reports; 30 TAC §290.46(f)(3)(B)(v), by failing to maintain the calibration records; 30 TAC §290.121(a) and (b), by failing to maintain an up-to-date chemical and microbiological monitoring plan; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices; 30 TAC §290.44(h)(1)(B)(i), by failing to conduct an annual inspection of a backflow prevention device; 30 TAC §290.46(t), by failing to post a legible sign; 30 TAC §290.42(l), by failing to maintain a thorough and up-to-date facility operations manual for operator review and reference; 30 TAC §290.45(b)(2)(C), Agreed Order Docket Number 2001-1357-PWS-E, Ordering Provision 2.e.iii., and THSC, §341.0315(c), by failing to provide the required transfer pump capacity; and 30 TAC §290.45(b)(2)(B), Agreed Order Docket Number 2001-1357-PWS-E, Ordering Provision 2.e.i., and THSC, §341.0315(c), by failing to provide the required treatment plant capacity; PENALTY: $12,725; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(46) COMPANY: Ysleta Independent School District; DOCKET NUMBER: 2007-1225-AIR-E; IDENTIFIER: RN102304086; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline dispensing station; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the seven pounds psi absolute maximum Reid vapor pressure requirement; PENALTY: $1,340; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

TRD-200706413
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 18, 2007

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Notice of District Hearing

Notice issued November 30, 2007.

Texas Commission on Environmental Quality (TCEQ) Docket No. 2007-1736-DIS; The TCEQ will conduct a hearing on an application for dissolution (Application) of Harris County Municipal Utility District No. 197 (District). The Application was filed with the TCEQ and included a petition from Daniel P. Gordon, the owner of property located within the District. The TCEQ will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code (TWC), Title 30, Part 1, Chapter 293 of the Texas Administrative Code (TAC) and the procedural rules of the TCEQ. The TCEQ will conduct the hearing at: 9:30 a.m., Wednesday, March 19, 2008, Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas.

The District was created by the Texas Commission on Environmental Quality, on November 18, 1981 and organized under the terms and pro-

visions of Article XVI, Section 59 of the Texas Constitution and Chapters 49 and 54, TWC. The District contains 34.967 acres of land within Harris County Texas. Pursuant to 30 TAC §293.131, the petition filed with the Application states that dissolution is desirable and necessary because the District is not required for the development of land within its boundaries. The petition filed with the Application states that the District: (1) has not performed any of the functions for which it was created for five consecutive years preceding the date of the Application, (2) is financially dormant, and (3) has no outstanding bonded indebtedness. An affidavit from the State Comptroller of Public Accounts was included in the Application certifying that the District has no bonded indebtedness. The District has no known assets or liabilities.

Pursuant to TWC §49.327, if the request for dissolution is approved, the District's assets, if any, will escheat to the State of Texas and will be administered by the State Comptroller of Public Accounts and disposed of in the manner provided by Chapter 74 of the Texas Property Code.

The purpose of this hearing is to provide all interested persons the opportunity to appear and offer testimony for or against the proposal contained in the Application. At the hearing, pursuant to TWC §49.324, the TCEQ will determine if the District should be dissolved.

For information regarding the date and time this application will be heard before the TCEQ, please submit written inquiries to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC-103, at the same address. For additional information, individual members of the public may contact the Districts Review Team at (512) 239-4691. General information regarding TCEQ is available on the internet at www.tceq.state.tx.us.

Si desea información en Español, puede llamar al (512) 239-0200.

Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the TCEQ Office of Public Assistance at 1-800-687-4040 or 1-800-RELAY-TX (TDD), at least one week prior to the hearing.

TRD-200706473
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 19, 2007

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Notice of Opportunity to Comment on a Default Order of Administrative Enforcement Action

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Order (DO). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 28, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 28, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DO and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DO shall be submitted to the commission in **writing**.

(1) COMPANY: Milo Drive, Inc.; DOCKET NUMBER: 2007-0220-EAQ-E; TCEQ ID NUMBER: RN105116677; LOCATION: northeast corner of Kyle Seale Parkway and Arroyo Hondo, San Antonio, Bexar County, Texas; TYPE OF FACILITY: 36.41 acres; RULES VIOLATED: 30 TAC §213.4(a)(1), by failing to submit an Edwards Aquifer Protection Plan for commission approval prior to conducting regulated activities in the Edwards Aquifer Recharge Zone; PENALTY: $6,000; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-200706445
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 18, 2007

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 28, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an

AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 28, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Abdul Oliwi dba Fina Gas Station; DOCKET NUMBER: 2007-0291-PST-E; TCEQ ID NUMBER: RN101541308; LOCATION: 9251 White Settlement Road, White Settlement, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.6(b)(2), by failing to file a written notification with the agency at least 30 days prior to initiating a major underground storage tank (UST) construction activity; 30 TAC §334.7(d)(3), by failing to provide amended registration for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition, or within 30 days of the date on which the owner or operator first becomes aware of the change or addition; 30 TAC §334.50(b)(2)(A)(i)(III) and Texas Water Code (TWC), §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §115.242(3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board (CARB) executive order, and free of defects that would impair the effectiveness of the system; 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each dispenser equipped with a Stage II vapor recovery system; and 30 TAC §115.245(1) and (2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment upon major system replacement or modification and at least once every 12 months; PENALTY: $8,400; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: IZ, Inc. dba IZ Food Mart; DOCKET NUMBER: 2006-1825-PST-E; TCEQ ID NUMBER: RN102239035; LOCATION: 699 West Renner Road, Richardson, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system; 30 TAC §115.246(1) and (3) and THSC, §382.085(b), by failing to maintain records on-site of all required Stage I and Stage II records pertaining to a UST system and make immediately available for inspection by commission personnel; 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to provide and maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable CARB executive order(s), and free of defects that would impair the effectiveness of the system, including, but not limited to absence or disconnection of any component that is a part of the approved system; 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump equipped with a Stage II vapor recovery system; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system which contained regulated substances including tanks, piping, and other ancillary equipment; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel each operating day; PENALTY: $25,000; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: New Process Steel, L.P.; DOCKET NUMBER: 2006-1440-AIR-E; TCEQ ID NUMBER: RN101874667; LOCATION: 5800 Westview Drive, Houston, Harris County, Texas; TYPE OF FACILITY: steel products processing site; RULES VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b), by failing to obtain permit authorization prior to construction and operation; PENALTY: $3,000; STAFF ATTORNEY: Dinniah M. Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Oxbow Calcining LLC f/k/a Great Lakes Carbon LLC; DOCKET NUMBER: 2006-0782-AIR-E; TCEQ ID NUMBER: RN100209287; LOCATION: 3901 Coke Dock Road, Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: calcining plant that transforms raw petroleum coke into calcined coke; RULES VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b), by failing to authorize emissions for sulfur trioxide; 30 TAC §106.144(1) and §122.143(4), Air Permit Number OP-01493, Special Condition 5, and THSC, §382.085(b), by failing to properly enclose the C35 Conveyor during operation on April 25, 2005; 30 TAC §116.110(a) and THSC, §382.085(b), by failing to authorize operation of the Magnesium Injection System prior to operation; 30 TAC §§111.111(a)(1)(A), 116.115(c)(1), and 122.143(4), Air Permit Number 45622, Special Condition 4, and THSC, §382.085(b), by failing to limit the opacity from the Kiln Three Waste Heat Boiler Stack; 30 TAC §106.144(1) and §122.143(4), Air Permit Number OP-01493, Special Condition 5, and THSC, §382.085(b), by failing to maintain equipment in such a manner as to ensure all exhaust air was vented through a fabric filter having a maximum filtering velocity of 4.0 feet per minute (ft/min) with mechanical cleaning or 7.0 ft/min with automatic air cleaning; 30 TAC §122.143(4) and §122.145(2)(A), Air Permit Number OP-01493, Special Condition 2C, and THSC, §382.085(b), by failing to report deviations on an Annual Compliance Certification Report; and 30 TAC §116.115(c) and §122.143(4), Air Permit Number 45622, Special Condition 7A, Air Permit Number 5421, Special Condition 10, Air Permit Number OP-01493, Special Condition 5, and THSC, §382.085(b), by failing to maintain records of hourly raw petroleum coke usage for two years; PENALTY: $35,784; Supplemental Environmental Project (SEP) offset amount of $17,892 applied to Southeast Texas Regional Planning Commission - West Port Arthur Home Energy Efficiency Program; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Sonny Nguyen dba Crystal Cleaners & Alteration; DOCKET NUMBER: 2006-0677-DCL-E; TCEQ ID NUMBERS: RN102315876 and RN100715721; LOCATIONS: 7847 Shoal Creek Boulevard and 2030 East Oltorf Street, Suite 108, Austin, Travis County, Texas; TYPE OF FACILITIES: dry cleaners; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form to the TCEQ for dry cleaning and/or drop station facilities; PENALTY: $2,370; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(6) COMPANY: Starr County; DOCKET NUMBER: 2006-1216-MSW-E; TCEQ ID NUMBER: RN102119120; LOCATION: 4.3 miles north of the intersection of United States Highway 83 and United States Highway 755, Rio Grande City, Starr County, Texas; TYPE OF FACILITY: Type I arid-exempt municipal solid waste landfill; RULES VIOLATED: 30 TAC §330.165(c), by failing to provide intermediate or final cover of not less than 12 inches for all areas of waste that have received waste but will be inactive for longer than 180 days; 30 TAC §330.131, by failing to control public access to the facility by means of artificial/natural barriers, appropriate to protect human health and safety and the environment; 30 TAC §330.15(e)(4), by failing to prohibit the disposal of whole scrap tires; 30 TAC §330.139(2), by failing to maintain and/or operate the working face of the landfill in a manner to control windblown solid waste; 30 TAC §330.225(b), by failing to prevent the unloading of waste in unauthorized areas and by failing to ensure that any waste deposited in an unauthorized area is removed immediately and disposed of properly; 30 TAC §330.147(a), by failing to properly designate a large-item salvage area; 30 TAC §330.143(b)(1), (b)(1)(A), and (b)(1)(C), by failing to ensure that all markers shall be posts extending six feet above ground level, by failing to install facility boundary markers, and by failing to install easement and right-of-way markers; and 30 TAC §330.145, by failing to take actions to encourage vehicles hauling waste to the facility to be enclosed or provided with a tarpaulin/net or other means to effectively secure the load in order to prevent the escape of any part of the load; PENALTY: $22,960; SEP offset amount of $22,960 applied to Texas Association of Resource Conservation & Development Areas, Inc. Cleanup of Unauthorized Trash Dumps; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(7) COMPANY: The Dow Chemical Company; DOCKET NUMBER: 2004-1344-MLM-E; TCEQ ID NUMBER: RN100225945; LOCATION: 2301 North Brazosport Boulevard, Freeport, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacturing operation; RULES VIOLATED: 30 TAC §115.352(4) and §116.715(a), 40 Code of Federal Regulations (CFR) §63.167(a)(1), THSC, §382.085(b), and TCEQ Air Permit Number 20432, Special Condition 2.E., by failing to equip 27 open-ended lines with a cap or plug within the operating areas of B19G1FU1, B231G2FU2, and B68ALFU1 between April 19, 2004 and April 18, 2005; 30 TAC §116.715(a), THSC, §382.085(b), and TCEQ Permit Number 20432, Special Condition 3.A., by failing to conduct auditory, visual, and olfactory (AVO) checks one shift each day for hydrogen chloride and chlorine leaks within the operating area of B68ALFU1 between August 14 and 18, 2004; 30 TAC §115.354(2)(C) and THSC, §382.085(b), by failing to monitor five valves in highly reactive volatile organic compound (VOC) service during the second quarter of 2004; 30 TAC §116.715(a), THSC, §382.085(b), 40 CFR §63.152(c)(2)(ii), and TCEQ Air Permit Number 20432, Special Condition I-22.C., by failing to convert in-stack concentrations of carbon monoxide emissions to pounds per hour (lbs/hr) from Scrubber B19G1T210 for the third and fourth quarters of 2004; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ Air Permit Number 834, Special Condition 1, by failing to prevent unauthorized emissions on March 30, 2005; 30 TAC §116.715(a), THSC, §382.085(b), and TCEQ Air Permit Number 20432, Special Condition III-1, by failing to prevent unauthorized emissions on April 28, 2005; 30 TAC §§115.352(4), 116.155(c), and 122.143(4), 40 CFR §60.482-6(a)(1), THSC, §382.085(b), TCEQ Air Permit Number O-02215, Special Conditions 1.A. and 11, TCEQ Air Permit Number 19519, Special Condition 5.E., TCEQ Air Permit Number 48813, Special Condition 5.E., TCEQ Air Permit Number 6803, Special Condition 9.E., TCEQ Air Permit Number 834, Special Condition 9.E., and TCEQ Air Permit Number 8567, Special Condition 8.E., by failing to equip 27 open-ended lines with a cap or plug within the operating areas of B27P3FU3, B25P2FU1, B25P2FU2, B37P4FU1, B41P4FU1, and B77APFU1 between February 27, 2004 and August 29, 2004; 30 TAC §§115.352(2), 116.115(c), and 122.143(4), THSC, §382.085(b), TCEQ Air Permit Number O-02215, Special Conditions 1.A. and 11, and TCEQ Air Permit Number 834, Special Condition 9.I., by failing to either repair or place on the delay of repair list 10 leaking components in Unit B41P4FU1 within 15 days after the leak was discovered; 30 TAC §122.145(2)(A), THSC, §382.085(b), and TCEQ Air Permit Number O-02215, General Terms and Conditions, by failing to include the hydrogen chloride lead in Unit B41P4CT1 on July 2, 2004 as a deviation in the August 24, 2004 deviation report; 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), TCEQ Air Permit Number 48813, Special Condition 1, and TCEQ Air Permit Number O-02215, Special Condition 11, by failing to prevent unauthorized emissions of 663 pounds (lbs) of carbon released on February 10, 2004 for approximately two minutes, which were not reported within 24 hours; 30 TAC §101.201(a)(1)(B) and §122.143(4), THSC, §382.085(b), and TCEQ Air Permit Number O-02215, Special Condition 2.F., by failing to report within 24 hours the emissions event of 633 lbs of carbon released on February 10, 2004 for approximately two minutes; 30 TAC §§101.20(2), 116.115(c), and 122.143(4), 40 CFR §63.994(b)(1) and §63.1103(d), TCEQ Federal Operating Permit (FOP) O-02210, Special Terms and Condition 10, and TCEQ New Source Review (NSR) Air Permit Number 7531, Special Condition 6, by failing to establish minimum liquid to gas ratio for the operation of the scrubber (halogen reduction device) in the polycarbonate facility in the engineering thermoplastics unit during the performance test conducted on December 12, 2002; 30 TAC §116.115(b)(2)(G), THSC, §382.085(b), and Air Permit Number 37884, Maximum Allowable Emission Rate Table (MAERT), by failing to comply with the permitted limit established in the MAERT of Air Permit Number 37884 for propylene, carbon monoxide, and nitric oxide; 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number X-7386, MAERT, Special Condition 1, by failing to comply with the permitted limit established in the MAERT of Air Permit Number X-7386 for ethylene oxide; 30 TAC §115.121(a)(1) and §115.122(a) and THSC, §382.085(a), by failing to prevent the unauthorized emission of ethylene at the Dow's Plant B Polyethylene Unit for a period of 33 hours starting on April 7, 2003; 30 TAC §116.115(c), THSC, §382.085(b), and NSR Permit Number 19041, Special Condition Number 9, by failing to have available the records to demonstrate that samples were being continuously collected from the bottoms of stripping towers T-444 and T-445; 30 TAC §116.115(c), THSC, §382.085(b), and NSR Permit Number 19041, Special Condition Number 13, by failing to use an approved method to establish the lbs/hr of VOCs emitted into the atmosphere from cooling towers CT-320 and CT-2320; 30 TAC §116.115(c), THSC, §382.085(b), and NSR Permit Number 19041, Special Condition Number 19B, by failing to conduct a quarterly accuracy audit for the continuous emission monitoring system on Boiler Number 2 FTB-402 (EPN Number OC5SV404) for the third quarter of 2002; 30 TAC §101.20(2) and §116.115(c), 40 CFR §§63.163(c)(1) and (2), 63.168(f)(1), and 63.174(d), THSC, §382.085(b), and NSR Permit Number 19041, Special Condition Numbers 1, 15, and 16, by failing to meet the requirements of the VOC leak detection and repair programs; 30 TAC §101.20(2) and §116.115(c), 40 CFR §63.1004(b), THSC, §382.085(b), and NSR Permit Number 19041, Special Condition Number 1, by failing to perform VOC leak detection monitoring of valves according to 40 CFR Part 60, Appendix A-7, Method 21, 8.3.1 during the fourth quarter of 2003; 30 TAC §335.2(b) and §335.431, 40 CRF §268.1(a) and §268.40(a), and TCEQ Hazardous Waste Permit Number 50161, Permit Provision III-E 10 and V-EE, by failing to prevent the disposal of unauthorized hazardous waste into an on-site hazardous waste land-

fill; 30 TAC §116.715(a), THSC, §382.085(b), and TCEQ Air Flexible Permit Number 2043/PSD-TX-894, by failing to prevent the lock-nut from falling off the positioner pin, which disconnected the feedback arm from the coupler block in the LHC-8; 30 TAC §101.201(b) and THSC, §382.085(b), by failing to submit a complete final emissions event report; 30 TAC §116.715(a), THSC, §382.085(b), Air Permit Number 20432, Special Condition III-1, by failing to comply with Air Permit Number 20432, Special Condition III-1, by allowing the release of unauthorized emissions at the Light Hydrocarbon 7 facility during a nonexempt emissions event which lasted from 4:35 a.m. until 9:30 a.m. on August 13, 2004; 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number 20776, Special Condition 8, by failing to maintain pH and water flow rates for Scrubber D-27; 30 TAC §116.115(c), THSC, §382.085(b), Air Permit Number 20776, Special Condition 7.G., by failing to conduct an instrument-monitored fugitive emission inspection on a pump, Tag Number EAI273155, for two quarters, fourth quarter 2003 and first quarter 2004; 30 TAC §116.115(c), THSC, §382.085(b), Air Permit Number 20776, Special Conditions 6.E. and 7.E., by failing to maintain caps and/or plugs on four open-ended lines in the B6600 Quat 188 Plant for components EAI272070 (T-100c/EPN B6610V100), EAI 272990 (T-100c/EPN B6610V100), EAI1273010 (D-57/EPN Unknown), and EAI272471 (P-53 A/EPN B6610V53); 30 TAC §116.115(b)(2)(F), THSC, §382.085(b), and Air Permit Number 20776, General Condition 7, by failing to retain two-year fugitive emission monitoring records for 21 components in methylene chloride service and 22 components in VOC service; 30 TAC §116.115(c), THSC, §382.085(b), and Air Permit Number 20776, Special Condition 10, by failing to monitor for fugitive emissions all connectors, regardless of size, in VOC service; 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain a permit prior to constructing and operating methylene chloride extraction Tower T-100c; 30 TAC §116.115(c), THSC, §382.085(b), and Permit Number 7386, Special Condition 1, by exceeding the maximum allowable emission rate for VOC during an avoidable emissions event at the Hydroxy Alkyl Acrylates Plant on December 23, 2004; 30 TAC §§115.354(2)(C), 101.20(2) and 122.143(4), 40 CFR §63.168(b)(1), THSC, §382.085(b), and TCEQ FOP Number O-01388, Special Condition Number 1.A., by failing to monitor 269 valves in volatile hazardous air pollutant (VHAP) service in the Chemicals and Metal (1) area; 30 TAC §§115.352(4), 101.20(2), and 122.143(4), 40 CFR §63.168(b)(1), THSC, §382.085(b), and TCEQ FOP Number O-01388, Special Condition Number 1.A., by failing to equip 49 open-ended lines in the Chemicals and Metal (1) area with a second valve, blind flange, cap, or plug; 30 TAC §101.20(2) and §122.143(4), 40 CFR §63.148(b), THSC, §382.085(b) TCEQ FOP Number O-01388, Special Condition Number 1.A., by failing to conduct an annual AVO inspection of the closed vent system in VHAP service in the Chemicals and Metal (1) area; 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), TCEQ Air Permit Number 5339, Special Condition Number 11, TCEQ Air Permit Number 48478, Special Condition Number 2, and TCEQ Air Permit Number 5661, Special Condition Number 6, by failing to adequately maintain records regarding repairs and replacements done as a result of leaks documented during AVO inspections of the Chemicals and Metals (1) areas once per shift; 30 TAC §116.116(b)(1) and THSC, §382.085(b), by failing to operate within permit representations; 30 TAC §116.115(c), THSC, §382.085(b), and TCEQ NSR Permit Number 834, Special Condition 1, by failing to prevent unauthorized emissions on May 26, 2004; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to submit an emissions event report within 24 hours after discovery of the event; 30 TAC §116.715(a), THSC, §382.085(b), and TCEQ Flexible Permit Number 20432, Special Condition Chapter III-1, by failing to prevent unauthorized emissions on March 5, 2003; 30 TAC §§115.126(1)(B), 116.115(c), and 122.143(4), THSC, §382.085(b), General Operating Permit Number O-012212, Special Condition Numbers 1E and 16, and Air Permit Number 22072, Special Condition Number 4, by failing to meet the flare requirements for three flares (EPN Numbers BSRF601, BSRFMW1T, and BSRFMNF); 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), General Operating Permit Number O-02212, Special Condition Numbers 1E and 16, and Air Permit Number 22072, Special Condition Numbers 4 and 5, by failing to maintain the continuous presence of a flame on five occasions for three flares (EPN Numbers BSRFMNF, BSRF601, and BSRFMW1T); 30 TAC §106.262(3) and §122.143(4), THSC, §382.085(b), and General Operating Permit Number O-02212, Special Condition Number 17, by failing to submit Permit by Rule notification (Form PI-7) within 10 days following modifications to the brine process for the aromatic storage wells (EPN Numbers BSRPSR2 and BSRPR2L) in to Lake Warder and SR-2 (benzene brine ponds); 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), General Operating Permit Number O-02212, Special Condition Number 16, and Air Permit Number 22072, Special Condition Number 8(F), by failing to monitor 504 valves and 1,716 connectors in the fugitive emissions area (EPN Number BSRFUBRCK) during third and fourth quarters of 2004 and the second quarter of 2005; 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report the deviation of failure to conduct fugitive emissions monitoring on 504 valves and 1,716 connectors in the fugitive area (EPN Number BSRFUBRCK) during the second quarter of 2005 in the deviation report dated August 5, 2005; 30 TAC §117.208(d)(7) and §122.143(4), THSC, §382.085(b), and General Operating Number O-02212, Special Condition Number 1D, by failing to check for proper operation of the engine (EPN Number BSRGE601) by recorded measurements of nitrogen oxide and carbon monoxide emissions after engine maintenance was conducted on February 26, 2005; 30 TAC §117.216(a)(5) and §122.143(4), THSC, §382.085(b), and General Operating Permit Number O-02212, Special Condition Number 1D, by failing to include the specific rule citations for units with a claimed exemption from the emission specifications of 30 TAC §117.206 in the final control report submitted March 31, 2005; 30 TAC §116.115(b)(2)(F) and (c) and §101.20(2), 40 CFR §63.9000(a), THSC, §382.085(b), NSR Air Permit Number 46431, General Condition 8 and Special Condition 5, by failing to comply with hydrogen chloride emissions limits of 0.40 lbs/hr and 12.0 parts per million and Chlorine emissions limits of 0.03 lbs/hr and by failing to comply with the minimum destruction efficiency of 99.99% for VOCs; 30 TAC §§ 111.111(a)(4)(A)(I), 116.715(a), and 101.20(1), 40 CFR §60.18(c)(2), THSC, §382.085(b), Flexible Air Permit Number 20432, Special Condition III-1 and Special Condition-Flexible Permit General Requirements 4 (now Special Condition III-17), by failing to prevent unauthorized emissions, by failing to prevent visible emissions from a process gas flare for more than five minutes in any two-hour period, and by failing to operate a process gas flare with a pilot flame present at all times; 30 TAC §111.111(a)(8)(A) and §116.115(c), THSC, §382.085(b), and NSR Air Permit Number 834, Special Condition 1, by failing to prevent unauthorized emissions and by failing to prevent visible emissions with an opacity greater than 30% for any six-minute period on July 13, 2004; and 30 TAC §116.115(c), THSC, §382.085(b), and NSR Air Permit Number 834, Special Condition 1, by failing to prevent unauthorized emissions on April 6, 2004; PENALTY: $648,904; SEP offset amount of $324,452 applied to Houston-Galveston Area Emission Reduction Credit Organization Clean Cities/Clean Vehicles Program; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200706444

Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 18, 2007

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Notice of Water Quality Applications

The following notices were issued during the period of December 6, 2007 through December 17, 2007.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

ADDICKS UTILITY DISTRICT has applied for a major amendment to TPDES Permit No. WQ0011696002 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 40,000 gallons per day to a daily average flow not to exceed 800,000 gallons per day. The facility is located approximately 1.3 miles east of the intersection of Barker-Cypress Road and Morton Road (Groschke Road) adjacent to Morton Road and approximately 2 miles north of the intersection of Interstate Highway 10 and Barker-Cypress Road in Harris County, Texas.

AMERIFORGE CORPORATION which operates the Ameriforge East & West wastewater treatment plant (WWTP), a metal shaping facility, has applied for a renewal of TPDES Permit No. WQ0003767000, which authorizes the discharge of non-contact cooling water, storm water, domestic wastewater, and drainage from the forklift area at a daily average dry weather flow not to exceed 30,000 gallons per day via Outfall 001. The total volume discharged during any 24-hour period shall not exceed 60,000 gallons per day. The facility is located at 13770 Industrial Boulevard in the City of Houston, Harris County, Texas.

CITY OF CORRIGAN has applied for a renewal of TPDES Permit No. WQ0010787001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located approximately 2,900 feet northeast of the intersection of U.S. Highway 59 and State Highway 352 in Polk County, Texas.

CITY OF GREENVILLE has applied for a renewal of TPDES Permit No. WQ0010485002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,230,000 gallons per day. The facility is located at 100 Division Street, approximately 1.3 miles east of the intersection of Interstate Highway 30 and U.S. Highway 69 in Hunt County, Texas.

CITY OF HAWK COVE has applied for a renewal of TPDES Permit No. WQ0014522001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility will be located at 9543 Morris Drive, 3,600 feet southeast of the intersection of County Road 3613 and County Road 3608 in Hunt County, Texas.

CITY OF HOUSTON has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010495115, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 1,000 feet west of Interstate Highway 45 and 2,700 feet north of Gears Road, on the north side of and adjacent to Greens Bayou in Harris County, Texas.

CITY OF HOUSTON HOUSTON AIRPORT SYSTEM has applied for a renewal of TPDES Permit No. WQ0012418001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 7,000 gallons per day. The facility is located approximately 500 feet east of Lee Road at a point approximately 1,800 feet north of the intersection of Will Clayton Parkway and Lee Road in Harris County, Texas.

CITY OF JACKSONVILLE has applied to the TCEQ for a renewal of TPDES Permit No. WQ0010693001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The facility is located on Canada Street, southeast of the crossing of Ragsdale Creek by Canada Street, southeast of the City of Jacksonville in Cherokee County, Texas.

CITY OF MONT BELVIEU has applied for a new permit, proposed TPDES Permit No. WQ0014807001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0011030001, which expired on February 1, 2007. The facility is located approximately 1.4 miles north of Interstate Highway 10 and 0.6 mile east of Eagle Drive on the east side Mont Belvieu in Chambers County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 49 has applied to the TCEQ for a renewal of TPDES Permit No. WQ0011919001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located at 14907 Ralston Road, approximately 400 feet north of the Beltway 8 and approximately 2,500 feet east of Garners Bayou in Harris County, Texas.

HOUSHANG SOLHJOU has applied for a renewal of TPDES Permit No. WQ0012261002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located on Airline Drive at Halls Bayou, approximately one mile north of the incorporated limits of the City of Houston in Harris County, Texas.

INLINE UTILITIES LLC has applied for a renewal of TPDES Permit No. WQ0013942001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located between the 9800 and 10700 blocks of Boudreaux Road, approximately 1/2 mile west of the intersection of Boudreaux Road and Steubner-Airline Road in Harris County, Texas.

KENNARD TOM FOLEY has applied for a renewal of TPDES Permit No. WQ0014193001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located 350 feet north of Charterwood's north boundary, 1,000 feet south of Cossey Road and 4,000 feet east of Farm-to-Market Road 249 in Harris County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied to the TCEQ for a renewal of TPDES Permit No. WQ0010363001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 24,000,000 gallons per day. The facility is located at 1500 Los Rios Boulevard, 200 feet east of Los Rios Boulevard, approximately 700 feet north of Farm-to-Market Road 544, one mile west of the Farm-to-Market Road 544 crossing of Rowlett Creek and approximately 3.5 miles east of the City of Plano in Collin County, Texas.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NOS 21, 22, AND 23 has applied for a renewal of TPDES Permit No. WQ0012144001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The facility is located at 4103 East Peach-

field Circle, approximately one mile southeast of the intersection of Stuebner-Airline Road and Bammel-North Houston Road, northwest of the City of Houston in Harris County, Texas.

RENE HINOJOSA has applied for a renewal of TPDES Permit No. WQ00013559001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located at 6909 Hermann Road, 350 feet east of Suburban Drive and approximately 1,400 feet northeast of the intersection of Suburban Drive and Mount Houston Road in Harris County, Texas.

SAN ANTONIO RIVER AUTHORITY has applied for a new permit, proposed TPDES Permit No. WQ0010749007, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility will be located 1961 Graytown Road, approximately 0.5 mile northwest of the intersection of Graytown Road and Abbott Road in Eastern Bexar County, Texas.

TEXAS PETROCHEMICALS LP AND KEMIRA WATER SOLUTIONS INC which operates the Texas Petrochemicals (TPC) Houston Plant, which manufactures organic chemicals, has applied for a major amendment to TPDES Permit No. WQ0000587000 to authorize additional non-process area storm waters via Outfall 001; add the authorization to discharge process wastewater and cooling tower blowdown from the TPC Baytown plant, storm water from the Dock Area and the NOx Boiler area, hydrotesting wastewaters, and define heated railcar condensate, condensate and demineralizer wastewaters as utility wastewaters, to be treated and discharged via Outfall 002; an increase in effluent limitations due to production changes at Outfall 002; and add non-process area storm waters Outfalls 004, 005, 006, and 007. The current permit authorizes the discharge of raw water treatment wastewaters and non-process area storm water at a daily average flow not to exceed 1,000,000 gallons per day via Outfall 001; the discharge of treated process wastewaters, non-chromate cooling tower blowdown, boiler blowdown, and storm water at a daily average flow not to exceed 5,500,000 gallons per day via Outfall 002; and non-process area storm water runoff on an intermittent and flow variable basis via Outfall 003. The facility is located at 8600 Park Place Boulevard, approximately 1.5 miles south-southwest of the intersection of Goodyear Drive and State Highway 225, in the City of Houston, Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

TRIGEANT LTD which operates a petroleum refinery, has applied for a major amendment without renewal to TPDES Permit No. WQ0002720000 to increase the total zinc effluent limitations at Outfall 001, based on new information regarding the width of the receiving waters at the point of discharge. The daily average total zinc limitation has been increased from 0.082 lbs/day (0.084 mg/l) to 0.36 lbs/day (0.16 mg/l) and the daily maximum has been increased from 0.12 lbs/day (0.177 mg/l) to 0.76 lbs/day (0.34 mg/l). The current permit authorizes a discharge of treated process wastewater, treated storm water, water softener blowdown, cooling tower blowdown, boiler blowdown, and hydrostatic test water at a daily average flow not to exceed 120,000 gallons per day via Outfall 001; and storm water on an intermittent and flow variable basis via Outfall 002. The facility is located at 6600 Up River Road, on the north side of Up River Road approximately one-half mile west of the intersection of Up River Road and Valero Way, northwest of the City of Corpus Christi, Nueces County, Texas.

UTILITIES INVESTMENT COMPANY INC has applied for a renewal of TPDES Permit No. WQ0013988001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 49,000 gallons per day. The facility is located approximately 2.5 miles west-northwest of the intersection of Interstate Highway 45 and Longstreet Road and 3.8 miles north-northwest of the intersection of River Road and Farm-to-Market Road 830 in Montgomery County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, toll-free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200706472
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 19, 2007

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Notice of Water Rights Applications

Notices issued December 6, 2007 through December 13, 2007.

APPLICATION NO. 12220; TTG Utilities, LP, P.O. Box 299, Gatesville, Texas 76528, Applicant, seeks a Temporary Water Use Permit to divert and use not to exceed 5 acre-feet of water within an 18-month period from a point on Cowhouse Creek, tributary of the Leon River, tributary of the Little River, tributary of the Brazos River, Brazos River Basin at a maximum diversion rate of 0.668 cfs (300 gpm) for industrial purposes (construction, dust control and soil compaction in Coryell County. The proposed diversion point is located upstream of Lake Belton on Cowhouse Creek at 31.2386° N Latitude, 97.7970° W Longitude, 22 miles southeast of the City of Gatesville and 10 miles northwest of the City of Killeen. The application was received on June 7, 2007. Additional information and fees were received on August 17 and September 14, 2007. The application was accepted for filing and declared administratively complete on September 17, 2007. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by December 27, 2007.

APPLICATION NO. 5259; Public Utilities Board of Brownsville, P.O. Box 3270, Brownsville, Texas 78523-6278, Applicant, seeks an extension of time to commence and complete construction of a reservoir. Water Use Permit No. 5259 authorizes the Permittee to construct and maintain a dam creating a reservoir on the Rio Grande located approximately 4 miles southeast of Brownsville, Texas, and to impound therein not to exceed 6,000 acre-feet of water at its normal operating level for storage as authorized by the International Boundary Water Commission. The portion of the dam in the United States will be in Cameron County in the Jose S. de la Garza (Espiritu Santo) Grant, Abstract No. 2 and Station 1+00 on the centerline of the dam will be North 90° West 3,100 feet from Corner No. 4 of los Borregos Banco No. 123. A provision of the permit states construction of the dam and reservoir must commence by September 29, 2002 and be completed by September 29, 2005. Two extensions have been granted, the latest establishing the deadline to begin construction by September 29, 2007 and completion of construction by September 29, 2009. Permittee seeks authorization to extend the date, by which the commencement of construction of the authorized reservoir must occur, from September 29, 2007 to September 29, 2012. The applicant also seeks to extend the authorized completion date from September 29, 2009 to September 29, 2014. The application was received on August 30, 2007, and additional information and fees were received on October 2, 2007. The application was determined to be administratively complete on October 4, 2007. Written

public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Texas Commission on Environmental Quality (TCEQ) Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200706474
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 19, 2007

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: 30-Day Pre-Election Report Due October 9, 2007

P. Allan Port, Amegy Bank PAC, 4400 Post Oak Parkway, Houston, Texas 77027

Deadline: 8-Day Pre-Election Report Due October 29, 2007

P. Allan Port, Amegy Bank PAC, 4400 Post Oak Parkway, Houston, Texas 77027

TRD-200706401
David A. Reisman
Executive Director
Texas Ethics Commission
Filed: December 17, 2007

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Texas Facilities Commission

Notice of Intent to Seek Consultant Services

In accordance with the provisions of Texas Government Code Chapter 2254, the Texas Facilities Commission (TFC) will be seeking Invitation for Offers to hire a consultant to provide economic impact analysis and financial modeling related to statewide facilities planning.

SCOPE OF SERVICES:

The scope of work and services under this agreement shall be to assist in the development of statewide facilities planning strategies by providing expertise in the following areas:

1. Geographical market and industry analyses

2. Economic forecasting and modeling

3. Economic impact analysis

4. Statistical modeling and analysis

5. Assistance with feasibility studies and financing models

The successful consultant shall work with the executive director to incorporate these services and related findings into the development of a comprehensive strategic plan addressing the current and future facilities space and location needs of Texas state government, and serve as a resource until such deliverables have been completed. These deliverables shall be in the form of a written report to be jointly produced and authored by the consultant and the executive director.

FINDING OF FACT:

The TFC has submitted a request to the Budget, Planning & Policy Division of the Governor's Office for a Finding of Fact that the requested consulting services are necessary. Execution of a contract is contingent upon receipt of this Finding of Fact.

CRITERIA FOR SELECTION:

The TFC will make its selection based on demonstrated competence, knowledge, and qualifications, considering the reasonableness of the proposed fees for consulting services.

CONDITIONS OF AWARD:

Consultant must deliver services in full compliance with non-discrimination requirements of the State of Texas. The selected Consultant will be required to enter into a consultant contract with the Texas Facilities Commission.

SUBMITTING OFFERS:

Any consultant submitting an offer in response to this notice must submit two (2) original copies of the submittal. The submittal must include the following:

1. Consultant's legal name and mailing and physical address

2. E-mail address, telephone and facsimile numbers of Consultant's primary contact

3. A description of the consultant's experience in the scope of services above

4. Information regarding the qualifications, education, and experience of the persons proposed to provide these consulting services

5. The price to perform the entire scope of services

6. The earliest date on which the consultant could begin to provide services

7. A list of three references

8. A completed Historically Underutilized Business subcontracting plan (the form can be found at *http://www.tfc.state.tx.us/communities/facilities/prog/construct/formsindex*).

9. A completed Execution of Submittal form (the form can be found at *http://tfc.state.tx.us/communities/facilities/prog/construct/formsindex*).

In order to be considered for this Consulting Services contract, a Response should be submitted, in accordance with the instructions in this notice to the TFC by 2:00 p.m. CST on January 18, 2007.

Telephone and facsimile responses will not be accepted. Responses may be submitted by mail to the mailing address listed below; or may be hand delivered to the physical address listed below.

Mailing Address:

Texas Facilities Commission

Attn: Edward Johnson, Executive Director

P.O. Box 13047

Austin Texas 78711-3047

Physical Address:

Texas Facilities Commission

Attn: Edward Johnson, Executive Director

1711 San Jacinto Blvd.

Austin, Texas 78701

Edward.Johnson@tfc.state.tx.us

QUESTIONS:

Questions concerning this notice and invitation should be submitted in writing or by email to the point of contact listed above.

TFC RIGHTS:

TFC reserves the right to accept or reject any or all offers submitted. TFC is under no obligation to execute any contract on the basis of this notice. TFC will not pay for any costs incurred by any entity in responding to this notice.

TRD-200706479
Kay Molina
General Counsel
Texas Facilities Commission
Filed: December 19, 2007

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Request for Proposals #303-8-10590

The Texas Facilities Commission (TFC), on behalf of the Department of Family and Protective Services announces the issuance of Request for Proposals (RFP) #303-8-10590. TFC seeks a five or ten year lease of approximately 4,101 square feet of office space in the Huntsville area, Walker County, Texas.

The deadline for questions is January 4, 2008, and the deadline for proposals is January 11, 2008, at 3:00 p.m. The award date is February 21, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Myra Beer at (512) 463-5773. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/1380/bid_show.cfm?bidid=74144*.

TRD-200706351
Kay Molina
General Counsel
Texas Facilities Commission
Filed: December 13, 2007

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Office of the Governor

Notice of Application and Priorities for the Justice Assistance Grant (JAG) Program Federal Application

The Criminal Justice Division (CJD) of the Governor's Office is preparing its application for the 2008 federal Edward Byrne Justice Assistance Grant Program. The amount available for this program will be determined after congressional adoption of the federal fiscal year 2008 appropriation for the U.S. Department of Justice.

The Governor's Criminal Justice Division proposes to fund projects that reduce violent crime.

Comments on the application or the priorities may be submitted in writing to Judy Switzer by e-mail at judy.switzer@governor.state.tx.us or mailed to the Criminal Justice Division, Office of the Governor, P.O. Box 12428, Austin, Texas 78711.

Comments must be received or postmarked no later than 30 days from the date of publication of this announcement in the *Texas Register*.

TRD-200706468
Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

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Request for Grant Applications (RFA) for the Crime Stoppers Assistance Fund Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting grant applications to support certified Crime Stoppers organizations in Texas during the state fiscal year 2009 grant cycle.

Purpose: The purpose of the Crime Stoppers Assistance funding is to enhance and assist the community's efforts in solving serious crimes.

Available Funding: State funding is authorized for these projects under Article 102.013, Texas Code of Criminal Procedure, which designated CJD as the funds administering agency. The source of funding is a biennial appropriation by the Texas Legislature from funds collected through court costs and fees.

Funding Levels:

(1) Minimum grant award - $1,500.

(2) Maximum grant award - $15,000.

Required Match: None.

Standards: Grantees must comply with the standards applicable to this funding source cited in the Texas Administrative Code (1 TAC Chapter 3) and all statutes, requirements and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying and administrative advocacy;

(3) promotional advertisements of any kind;

(4) entertainment or refreshments;

(5) subscription fees or dues.

(6) fundraising activities;

(7) office space rental;

(8) extended equipment services arrangements;

(9) contributions;

(10) purchase or improvement of real estate;

(11) rewards, except for statewide projects; and

(12) attorney fees.

Eligible Applicants: Crime Stoppers organizations as defined by §414.001(2) of the Texas Government Code that are certified by the Crime Stoppers Advisory Council to receive repayments under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Article 42.12 of the Texas Code of Criminal Procedure. Section 414.001(2) of the Texas Government Code defines a "crime stoppers organization" as follows:

(1) a private, nonprofit organization that is operated on a local or statewide level, that accepts and expends donations for rewards to persons who report to the organization information about criminal activity and that forwards the information to the appropriate law enforcement agency; or

(2) a public organization that is operated on a local or statewide level, that pays rewards to persons who report to the organization information about criminal activity, and that forwards the information to the appropriate law enforcement agency.

Requirements: Crime Stoppers programs must focus on reducing crime through the operation of a hotline that receives information about criminal activities and fugitives from members of the public, guarantees anonymity, forwards the information to the appropriate law enforcement agency, and pays rewards.

Project Period: Grant-funded projects must begin on or after September 1, 2008, and expire on or before August 31, 2009.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to projects that support information systems such as 24-hour tip hotlines, technology upgrades, and participation in the annual campus conference.

Closing Date for Receipt of Applications: All applications must be submitted via CJD's eGrants website on or before February 29, 2008.

Selection Process: Applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Betty Bosarge at betty.bosarge@governor.state.tx.us or (512) 463-1784.

TRD-200706456
Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

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Request for Grant Applications (RFA) for the Drug Court Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that support eligible drug court programs during the state fiscal year 2009 grant cycle.

Purpose: The purpose of the Drug Court Program is to support drug courts as defined in Chapter 469 of the Texas Health and Safety Code, which incorporate the following ten essential characteristics:

(1) The integration of alcohol and other drug treatment services in the processing of cases in the judicial system;

(2) The use of a non-adversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;

(3) Early identification and prompt placement of eligible participants in the program;

(4) Access to a continuum of alcohol, drug, and other related treatment and rehabilitative services;

(5) Monitoring of abstinence through weekly alcohol and other drug testing;

(6) A coordinated strategy to govern program responses to participants' compliance;

(7) Ongoing judicial interaction with program participants;

(8) Monitoring and evaluation of program goals and effectiveness;

(9) Continuing interdisciplinary education to promote effective program planning, implementation, and operations; and

(10) Development of partnerships with public agencies and community organizations.

Available Funding: Article 102.0178 of the Texas Code of Criminal Procedure establishes state funding for this purpose and designates CJD as the administering agency. Funds received under this article are deposited to the credit of the drug court account in the general revenue fund.

Funding Levels: None.

Required Match: None.

Standards: Grantees must comply with the standards applicable to this funding source cited in the Texas Administrative Code (1 TAC Chapter 3), and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) vehicles or equipment for government agencies that are for general agency use;

(4) weapons, ammunition, explosives or military vehicles;

(5) admission fees or tickets to any amusement park, recreational activity or sporting event;

(6) promotional gifts;

(7) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(8) membership dues for individuals;

(9) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (e.g., supplanting).

(10) fundraising;

(11) construction;

(12) medical services; and

(13) transportation, lodging, per diem or any related costs for participants, who attend training developed or coordinated using grant funds; and

Eligible Applicants: Counties and Municipalities.

Requirements:

(1) The presiding judge of a drug court funded under this RFA must be an active judge holding elective office, master or magistrate. Persons eligible for appointment may not be a former or retired judicial officer.

(2) Pursuant to Texas Health and Safety Code Section 469.006, counties with populations of more than 200,000 are required to establish a drug court. Applicants from these counties must apply for federal and state funds available to pay the costs of the program.

(3) Applicants may apply to use state drug court funds to provide a portion of the required cash match for federal drug court grants.

Project Period: Grant-funded projects must begin on or after September 1, 2008, and expire on or before August 31, 2009.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to mandated drug courts under Texas Health and Safety Code, §469.006.

Closing Date for Receipt of Applications: All applications must be submitted via CJD's eGrants website on or before February 29, 2008.

Selection Process: Applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Angie Martin at angie.martin@governor.state.tx.us or at (512) 463-1919.

TRD-200706457
Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

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Request for Grant Applications (RFA) for the Juvenile Justice and Delinquency Prevention (JJDP) Act Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that support juvenile justice and delinquency prevention during the state fiscal year 2009 grant cycle.

Purpose: The purpose of the JJDP Act Program is to improve the juvenile justice system and develop effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency.

Available Funding: Federal funding is authorized under the Juvenile Justice and Delinquency Prevention Act of 2002, Public Law 107-273, 42 U.S.C 5601 et seq. All grants awarded from this fund must comply with the requirements contained therein. As of the date of the issuance of this RFA, the U.S. Congress has not finalized federal appropriations for federal fiscal year 2008.

Funding Levels: All awards are subject to the availability of appropriated funds and any modifications or additional requirements that may be imposed by law.

Required Match: None.

Standards: Grantees must comply with the standards applicable to this funding source contained in the Texas Administrative Code (1 TAC Chapter 3) and all statutes, requirements, and guidelines applicable to this funding. In addition, grantees must comply with the federal regulations at 28 C.F.R. §31.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) vehicles or equipment for government agencies that are for general agency use;

(5) weapons, ammunition, explosives or military vehicles;

(6) admission fees or tickets to any amusement park, recreational activity or sporting event;

(7) promotional gifts;

(8) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(9) membership dues for individuals;

(10) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(11) fundraising;

(12) construction;

(13) medical services;

(14) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(15) legal services for adult offenders; and

(16) overtime pay.

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Independent school districts;

(4) Nonprofit corporations;

(5) Indian tribes performing law enforcement functions;

(6) Crime control and prevention districts;

(7) Universities;

(8) Colleges; and

(9) Faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) Applicants must address one or more of the following JJDP purpose areas:

(a) Aftercare/Reentry;

(b) Alternatives to Detention;

(c) Court Services;

(d) Delinquency Prevention;

(e) Disproportionate Minority Contact;

(f) Diversion;

(g) Gangs;

(h) Jail Removal;

(i) Juvenile Justice System Improvement;

(j) Mental Health Services;

(k) Mentoring;

(l) Probation;

(m) School Programs;

(n) Sex Offender Programs;

(o) Substance Abuse; and

(p) Youth Courts.

(2) In addition, all juvenile justice projects must address one or more of the following priorities:

(a) Family Stability. Programs or other initiatives designed to strengthen family support systems in an effort to positively impact the lives of youth and divert them from a path of serious, violent, or chronic delinquency.

(b) Substance Abuse Early Intervention and Prevention. Programs or other initiatives designed to address the use and abuse of illegal and other prescription and nonprescription drugs and the use and abuse of alcohol. Programs or other initiatives include control, prevention, and treatment.

(c) Education. Programs or other initiatives designed to prevent truancy, suspension, and expulsion. School safety programs may include support for school resource officers and law-related education.

(d) Disproportionate Minority Contact (DMC). Programs or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.

(e) Justice System Impact. Programs or other initiatives designed to impact offender accountability and/or improve the practices, policies, or procedures within the juvenile justice system.

(f) Gang Prevention. Programs or other initiatives designed to address issues related to juvenile gang activity, including prevention and intervention efforts directed at reducing gang-related activities.

(g) Rural Access. Programs or other initiatives designed to provide prevention, intervention, and treatment services located outside a metropolitan area.

(h) Training. Programs or other initiatives designed to offer specialized training for staff working directly with at-risk youth or juvenile offenders that can positively impact the quality of the services, staff turnover rates, and program stability.

Project Period: Grant-funded projects must begin on or after September 1, 2008, and expire on or before August 31, 2009.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to those applicants that demonstrate cost effective programs focused on proven or promising approaches to services provision.

Closing Date for Receipt of Applications: All applications must be submitted via CJD's eGrants website on or before March 14, 2008.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications will be forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee will prioritize all eligible applications based on identified community and/or comprehensive planning, cost and program effectiveness.

(c) CJD will accept priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on approved COG priorities, reasonableness of the project, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost effectiveness.

Contact Person: If additional information is needed, contact Ryan Clinton at ryan.clinton@governor.state.tx.us or (512) 463-1919.

TRD-200706459
Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

Request for Grant Applications (RFA) for the Safe and Drug-Free Schools and Communities (SDFSC) Act Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that implement drug and violence prevention activities which compliment or support local independent school district activities during the state fiscal year 2009 grant cycle.

Purpose: The purpose of the SDFSC Act Program is to support programs that prevent violence in and around schools; prevent the illegal use of alcohol, tobacco, and drugs; involve parents and communities; and are coordinated with related federal, state, school, and community

efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement.

Available Funding: Federal funding is authorized under the No Child Left Behind Act of 2001, Public Law 107-110. As of the date of the issuance of this RFA, the U.S. Congress has not finalized federal appropriations for federal fiscal year 2008.

Funding Levels: All awards are subject to the availability of appropriated funds and any modifications or additional requirements that may be imposed by law.

Required Match: None.

Standards: Grantees must comply with the standards applicable to this funding source contained in the Texas Administrative Code (1 TAC Chapter 3) and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, or costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) vehicles or equipment for government agencies that are for general agency use;

(5) weapons, ammunition, explosives or military vehicles;

(6) admission fees or tickets to any amusement park, recreational activity or sporting event;

(7) promotional gifts;

(8) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(9) membership dues for individuals;

(10) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(11) fundraising;

(12) construction;

(13) medical services;

(14) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(15) legal services for adult offenders; and

(16) overtime pay.

Eligible Applicants:

(1) State agencies;

(2) Cities;

(3) Counties;

(4) Independent school districts;

(5) Nonprofit corporations;

(6) Native American tribes;

(7) Crime control and prevention districts;

(8) Universities;

(9) Colleges;

(10) Juvenile boards;

(11) Regional education service centers;

(12) Community supervision and corrections departments;

(13) Council of governments; and

(14) Faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) Projects must meet the following principles of effectiveness:

(a) be based on an assessment of objective data regarding the incidence of violence and illegal drug use in the elementary schools and secondary schools and communities to be served, including an objective analysis of the current conditions and consequences regarding violence and illegal drug use, including delinquency and serious discipline problems among students who attend such schools (including private school students who participate in the drug and violence prevention program) that is based on ongoing local assessment or evaluation activities;

(b) be based on an established set of performance measures aimed at ensuring that the elementary schools, secondary schools, and communities to be served by the program have a safe, orderly, and drug-free learning environment;

(c) be based on scientifically-based research that provides evidence that the program to be used will reduce violence and illegal drug use;

(d) be based on an analysis of the data reasonably available at the time of the prevalence of risk factors, including high or increasing rates of reported cases of child abuse and domestic violence; protective factors, buffers, assets; or other variables in schools and communities in the state identified through scientifically-based research; and

(e) include meaningful and ongoing consultation with and input from parents in the development of the application and administration of the program or activity.

(2) Grant activities must include:

(a) activities that complement and support local independent school district activities including developing and implementing activities to prevent and reduce violence associated with prejudice and intolerance;

(b) dissemination of information about drug and violence prevention; and

(c) development and implementation of community-wide drug and violence prevention planning and organizing.

(3) All juvenile projects or applications for projects serving delinquent or at-risk youth must address at least one of the following:

(a) Family Stability. Programs or other initiatives designed to strengthen family support systems in an effort to positively impact the lives of youth and divert them from a path of serious, violent, and chronic delinquency.

(b) Substance Abuse Early Intervention and Prevention. Programs or other initiatives designed to address the use and abuse of illegal and other prescription and nonprescription drugs and the use and abuse of alcohol. Programs or other initiatives include control, prevention, and treatment.

(c) Education. Programs or other initiatives designed to prevent truancy, suspension, and expulsion. School safety programs may include support for school resource officers and law-related education.

(d) Disproportionate Minority Contact. Programs or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.

(e) Justice System Impact. Programs or other initiatives designed to impact offender accountability and/or improve the practice, policies, or procedures within the juvenile justice system.

(f) Gang Prevention. Programs or other initiatives designed to address issues related to juvenile gang activity, including prevention and intervention efforts directed at reducing gang-related activities.

(g) Rural Access. Programs or other initiatives designed to provide prevention, intervention, and treatment services located outside a metropolitan area.

(h) Training. Programs or other initiatives designed to offer specialized training for staff working directly with at-risk youth or juvenile offenders that can positively impact the quality of the services, staff turnover rates, and program stability.

Project Period: Grant-funded projects must begin on or after September 1, 2008, and expire on or before August 31, 2009.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to:

(1) programs or activities that prevent illegal drug use and violence for:

(a) children and youth who are not normally served by state educational agencies or local educational agencies; and

(b) populations that need special services or additional resources (such as youth in juvenile detention facilities, runaway or homeless children and youth, pregnant and parenting teenagers, and school dropouts).

(2) programs that pursue a comprehensive approach to drug and violence prevention that includes providing and incorporating mental health services related to drug and violence prevention.

Closing Date for Receipt of Applications: All applications must be submitted via CJD's eGrants website on or before February 29, 2008.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications are forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee will prioritize all eligible applications based on identified community and/or comprehensive planning, cost, and program effectiveness.

(c) CJD will accept priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on approved COG priorities, reasonableness of the project, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost effectiveness.

Contact Person: If additional information is needed, contact Ryan Clinton at ryan.clinton@governor.state.tx.us or at (512) 463-1919.

TRD-200706458

Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

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Request for Grant Applications (RFA) for the State Criminal Justice Planning (Fund 421) Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce crime and improve the criminal or juvenile justice system during the state fiscal year 2009 grant cycle.

Purpose: The purpose of the Fund 421 Program is to reduce crime and improve the criminal or juvenile justice system.

Available Funding: §102.056 of the Texas Code of Criminal Procedure establishes state funding for this purpose, and §772.006 of the Texas Government Code designates CJD as the administering agency. The source of funding is a biennial appropriation by the Texas Legislature from funds collected through court costs and fees.

Funding Levels: None.

Required Match: None.

Standards: Grantees must comply with the standards applicable to this funding source cited in the Texas Administrative Code (1 TAC Chapter 3) and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) vehicles or equipment for government agencies that are for general agency use;

(5) weapons, ammunition, explosives or military vehicles;

(6) admission fees or tickets to any amusement park, recreational activity or sporting event;

(7) promotional gifts;

(8) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(9) membership dues for individuals;

(10) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(11) fundraising;

(12) construction;

(13) medical services;

(14) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training; and

(15) legal services for adult offenders.

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Independent school districts;

(4) Nonprofit corporations;

(5) Native American tribes;

(6) Crime control and prevention districts;

(7) Universities;

(8) Colleges;

(9) Hospital districts;

(10) Juvenile boards;

(11) Regional education service centers;

(12) Community supervision and corrections departments;

(13) Councils of governments; and

(14) Faith-based organizations that provide direct services. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) Projects must focus on reducing crime and improving the criminal or juvenile justice system;

(2) All projects providing direct assistance to crime victims must promote collaboration and coordination among local service systems that involve multiple disciplines and support a seamless delivery of a continuum of services that focus on each individuals return to physical, mental, and emotional health. An example of this type of approach is advocacy, law enforcement, prosecution, and other government and non-government services working together in a professional environment of cooperation and respect among service providers; and

(3) All juvenile projects or applications for projects serving delinquent or at-risk youth must address at least one of the following:

(a) Family Stability. Programs or other initiatives designed to strengthen family support systems in an effort to positively impact the lives of youth and divert them from a path of serious, violent and chronic delinquency.

(b) Substance Abuse Early Intervention and Prevention. Programs or other initiatives designed to address the use and abuse of illegal and other prescription and nonprescription drugs and the use and abuse of alcohol. Programs or other initiatives include control, prevention, and treatment.

(c) Education. Programs or other initiatives designed to prevent truancy, suspension, and expulsion. School safety programs may include support for school resource officers and law-related education.

(d) Disproportionate Minority Contact. Programs or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.

(e) Justice System Impact. Programs or other initiatives designed to impact offender accountability and/or improve the practices, policies, or procedures within the juvenile justice system.

(f) Gang Prevention. Programs or other initiatives designed to address issues related to juvenile gang activity, including prevention and intervention efforts directed at reducing gang-related activities.

(g) Rural Access. Programs or other initiatives designed to provide prevention, intervention, and treatment services located outside a metropolitan area.

(h) Training. Programs or other initiatives designed to offer specialized training for staff working directly with at-risk youth or juvenile offenders that can positively impact the quality of the services, staff turnover rates, and program stability.

Project Period: Grant-funded projects must begin on or after September 1, 2008, and expire on or before August 31, 2009.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to applicants who demonstrate cost effective programs focused on a comprehensive and effective approach to services that compliment the Governor's strategies.

Closing Date for Receipt of Applications: All applications must be submitted via CJD's eGrants website on or before February 29, 2008.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications will be forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee prioritizes all eligible applications based on identified community and/or comprehensive planning, cost and program effectiveness.

(c) CJD will accept priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on COG priorities, reasonableness, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Judy Switzer at judy.switzer@governor.state.tx.us or (512) 463-1919.

TRD-200706460
Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

♦ ♦ ♦

Request for Grant Applications (RFA) for the S.T.O.P. Violence Against Women Act (VAWA) Fund Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce and prevent violence against women during the state fiscal year 2009 grant cycle.

Purpose: The purpose of the VAWA Fund Program is to assist in developing and strengthening effective law enforcement and prosecution strategies to combat violent crimes against women and to develop and strengthen victim services in such cases.

Available Funding: Federal funding is authorized for these project under the Violence Against Women Act of 1994 (VAWA) and reauthorized and amended by the Violence Against Women Act of 2000 (VAWA 2000) and by the Violence Against Women Act of 2005 (VAWA 2005) as amended (U.S.C. §§3796gg- through 3796gg-5).

Funding Levels: Minimum grant award - $5,000. All awards are subject to the availability of appropriated funds and any modifications or additional requirements that may be imposed by law.

Required Match: Grantees, other than Native American tribes and non-profit, non-governmental victim service providers, must provide matching funds of at least thirty-five percent (35%) of total project expenditures. This requirement may be met through cash and/or in-kind contributions.

Standards: Grantees must comply with the standards applicable to this funding source cited in the Texas Administrative Code (1 TAC Chapter 3) and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grantees may not use grant funds or program income to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) vehicles or equipment for governmental agencies that are for general agency use;

(5) admission fees or tickets to any amusement park, recreational activity, or sporting event;

(6) promotional gifts;

(7) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and that event is not related to amusement and/or social activities in any way;

(8) membership dues for individuals;

(9) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state, or local funds (e.g., supplanting), including the Texas Crime Victims Compensation Fund;

(10) fundraising;

(11) overtime;

(12) cash payments to victims;

(13) legal assistance and representation in civil matters other than protective orders;

(14) legal defense services for perpetrators of violence against women;

(15) liability insurance on buildings;

(16) major maintenance on buildings;

(17) property loss. Grant funds may not be used to reimburse victims for expenses incurred as a result of a crime, such as insurance deductibles, replacement of stolen property, funeral expenses, lost wages, and medical bills;

(18) services for programs that focus on children and/or men; and

(19) sexual assault or domestic violence prevention curricula developed for schools.

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Nonprofit corporations;

(4) Indian tribal governments;

(5) Crime control and prevention districts;

(6) Universities;

(7) Colleges;

(8) Community supervision and corrections departments;

(9) Councils of governments (COGs); and

(10) Faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Project Requirements:

(1) Promote collaboration and coordination among local service systems that involve multiple disciplines and support a seamless delivery of a continuum of services that focus on each individuals return to full physical, mental, and emotional health. An example of this type of approach is advocacy, law enforcement, prosecution, and other government and non-government services working together in a professional environment of cooperation and respect among service providers.

(2) All applicants must meet at least one or more of the following statutory program purpose areas established by the federal Office on Violence Against Women and codified at 28 C.F.R. §90:

(a) Training law enforcement officers, judges, other court personnel, and prosecutors to more effectively identify and respond to violent crimes against women, including the crimes of sexual assault, domestic violence, and dating violence;

(b) Developing, training, or expanding units of law enforcement officers, judges, other court personnel, and prosecutors specifically targeting violent crimes against women, including the crimes of sexual assault and domestic violence;

(c) Developing and implementing more effective police, court, and prosecution policies, protocols, orders, and services specifically devoted to preventing, identifying, and responding to violent crimes against women, including the crimes of sexual assault and domestic violence;

(d) Developing, installing, or expanding data collection and communication systems, including computerized systems, linking police, prosecutors, and courts or for the purpose of identifying and tracking arrests, protection orders, violations of protection orders, prosecutions, and convictions for violent crimes against women, including the crimes of sexual assault and domestic violence;

(e) Developing, enlarging, or strengthening victim services programs, including sexual assault, domestic violence, and dating violence programs, developing or improving delivery of victim services to underserved populations, providing specialized domestic violence court advocates in courts where a significant number of protection orders are granted, and increasing reporting and reducing attrition rates for cases involving violent crimes against women, including crimes of sexual assault, domestic violence, and dating violence;

(f) Developing, enlarging, or strengthening programs addressing stalking;

(g) Developing, enlarging, or strengthening programs addressing the needs and circumstances of Indian tribes in dealing with violent crimes against women, including the crimes of sexual assault and domestic violence;

(h) Supporting formal and informal statewide, multidisciplinary efforts, to the extent not supported by state funds, to coordinate the response of state law enforcement agencies, prosecutors, courts, victim services agencies, and other state agencies and departments, to violent crimes against women, including the crimes of sexual assault, domestic violence, and dating violence;

(i) Training of sexual assault forensic medical personnel examiners in the collection and preservation of evidence, analysis, prevention, and

providing expert testimony and treatment of trauma related to sexual assault;

(j) Developing, enlarging, or strengthening programs to assist law enforcement, prosecutors, courts, and others to address the needs and circumstances of older and disabled women who are victims of domestic violence or sexual assault, including recognizing, investigating, and prosecuting instances of such violence or assault and targeting outreach and support, counseling, and other victim services to such older and disabled individuals;

(k) Providing assistance to victims of domestic violence and sexual assault in immigration matters;

(l) Maintaining core victim services and criminal justice initiatives, while supporting complementary new initiatives and emergency services for victims and their families;

(m) Supporting the placement of special victim assistants (to be known as "Jessica Gonzales Victim Assistants") in local law enforcement agencies to serve as liaisons between victims of domestic violence, dating violence, sexual assault, and stalking and personnel in local law enforcement agencies in order to improve the enforcement of protection orders. Jessica Gonzales Victim Assistants shall have expertise in domestic violence, dating violence, sexual assault, or stalking and may undertake the following activities:

(i) Developing, in collaboration with prosecutors, courts, and victim service providers, standardized response policies for local law enforcement agencies, including triage protocols to ensure that dangerous or potentially lethal cases are identified and prioritized;

(ii) Notifying persons seeking enforcement of protection orders as to what responses will be provided by the relevant law enforcement agency;

(iii) Referring persons seeking enforcement of protection orders to supplementary services (such as emergency shelter programs, hotlines, or legal assistance services); and

(iv) Taking other appropriate action to assist or secure the safety of the person seeking enforcement of a protection order; and

(n) To provide funding to law enforcement agencies, nonprofit nongovernmental victim services providers, and State, tribal, territorial, and local governments, (which funding stream shall be known as the Crystal Judson Domestic Violence Protocol Program) to promote:

(i) The development and implementation of training for local victim domestic violence service providers, and to fund victim services personnel, to be known as "Crystal Judson Victim Advocates," to provide supportive services and advocacy for victims of domestic violence committed by law enforcement personnel:

(ii) The implementation of protocols within law enforcement agencies to ensure consistent and effective responses to the commission of domestic violence by personnel within such agencies (such as the model policy promulgated by the International Association of Chiefs of Police 'Domestic Violence by Police Officers: A Policy of the IACP, Police Response to Violence Against Women Project' July 2003);

(iii) The development of such protocols in collaboration with State, tribal, territorial and local victim services providers and domestic violence.

Project Period: Grant-funded projects must begin on or after September 1, 2008, and will expire on or before August 31, 2009.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to projects that streamline administrative and reporting processes by consolidating grant requests whenever possible in lieu of submitting multiple applications.

Closing Date for Receipt of Applications: All applications must be submitted via CJD's eGrants website on or before February 29, 2008.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications will be forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee will prioritize all eligible applications based on identified community and/or comprehensive planning, cost and program effectiveness.

(c) CJD will accept priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on eligibility, approved COG priorities, reasonableness of the project, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Lori Melcher at lori.melcher@governor.state.tx.us or (512) 463-1919.

TRD-200706461
Christopher Burnett
Assistant General Counsel
Office of the Governor
Filed: December 19, 2007

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Texas Health and Human Services Commission

Notice of Hearing on Proposed Provider Payment Rate Methodology

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public rate hearing to receive public comment on proposed Medicaid payment rates for Rural Health Clinics (RHCs) and Federally Qualified Health Clinics (FQHCs). These programs are operated by the Health and Human Service Commission (HHSC). The rate hearing will be held on Wednesday, January 10, 2008, at 9:00 a.m. in the Palo Duro Canyon Conference Room of the Braker Center, Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. Entry is through Security at the entrance of 11209 Metric Boulevard. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) § 355.105(g), §§355.201(e) - (f) and §32.0282 of the Human Resources Code, which require public hearings on proposed payment rates for medical assistance programs.

Proposal. The reimbursement methodology for RHCs requires that the rates be inflated every calendar year by the Medicare Economic Index (MEI), which is set by the Centers for Medicare and Medicaid Services. For RHCs, the MEI is 1.8% for calendar year 2008. The reimbursement methodology for FQHCs requires that the rates be inflated by the MEI every calendar year, plus 1.5%. For calendar year 2008, the MEI for FQHCs is 1.8%. The proposed payments will be effective January 1, 2008. The change is being implemented to allow providers to receive payments that better represent their costs for providing these services to Medicaid clients.

Methodology and justification. The proposed rates were determined in accordance with the rate reimbursement setting methodology at 1 TAC §355.8261 for FQHCs and 1 TAC §355.8101 for RHCs and in compliance with the Social Security Act §1902(bb) (42 USC §1396a(bb)).

Written Comments. Written comments regarding the proposed reimbursement methodology may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Amber Lovett, HHSC Rate Analysis, MC H-400, P.O. Box 85200, Austin, Texas 78708-5200 or by email to amber.lovett@hhsc.state.tx.us. Express mail can be sent, or written comments can be hand delivered, to Ms. Lovett, HHSC Rate Analysis, MC H-400, Braker Center Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Ms. Lovett at (512) 491-1998.

Briefing Package. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates by contacting Ms. Lovett at (512) 491-1371, or HHSC Rate Analysis, MC H-400 P.O. Box 85200, Austin, Texas 78708-5200. Briefing packages also will be available at the hearing.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1174 by January 7, 2008, so appropriate arrangements can be made.

TRD-200706483
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 19, 2007

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Texas Higher Education Coordinating Board

Request for Proposals for Texas Teacher Quality Grant Program for Higher Education

CFDA No. 84.367B

Notice Inviting Applications for New Awards under the Teacher Quality Grants Program (Public Law 107-110) for implementation during the period May 1, 2008 - May 31, 2009.

PURPOSE: To provide assistance to universities, colleges collaborating with high-need Texas school districts for significant projects designed to improve the quality of instruction and student performance in mathematics and science.

DEADLINE FOR TRANSMITTAL OF APPLICATIONS: January 22, 2008

RFP AVAILABLE: December 4, 2007

APPLICATIONS AVAILABLE: December 10, 2007

AVAILABLE FUNDS: $5,600,000

ESTIMATED RANGE OF AWARDS: $80,000 - $87,000

ESTIMATED NUMBER OF AWARDS: 50 - 60

PROJECT PERIOD: May 1, 2008 - May 31, 2009

BUDGET PERIOD: 13 Months

APPLICABLE REGULATIONS:

(a) Public Law 107-110;

(b) Education Department General Administrative Regulations (EDGAR), 34 CFR Parts 74, 75, 76, 77, 79, 80, 81, 82, 85, and 86;

(c) Audit Requirements under OMB Circular A-133 for public colleges and universities, and for independent colleges and universities; and

(d) OMB Circular A-21: Cost Principles for Educational Institutions; and OMB Circular A-102, Part 80: Subpart A-C, Section 80.1 - 80.35(see Appendix D).

For more information, go to the Teacher Quality website: http://www.utdanacenter.org/teacherquality/rfp.php

TRD-200706471
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: December 19, 2007

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Texas Department of Insurance

Company Licensing

Application to change the name of AMERICAN CENTRAL INSURANCE COMPANY to ESSENTIA INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Chesterfield, Missouri.

Application for admission to the State of Texas by AUTO ONE SELECT INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Melville, New York.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200706470
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 19, 2007

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Correction of Error

The Texas Department of Insurance proposed amendments to 28 TAC §26.402 and §26.404 in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9253). A clerical error in the preamble requires correction. On page 9254, right column, first paragraph, the date "January 7, 2008" should be "January 14, 2008". The first sentence should read:

"REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 14, 2008. . . ."

TRD-200706395

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Third Party Administrator Applications

The following third party administrator applications have been filed with the Texas Department of Insurance and are under consideration.

Application of ALTERNATIVE SERVICE CONCEPTS, L.L.C., a foreign third party administrator. The home office is DOVER, DELAWARE.

Application of NOVAPRO RISK SOLUTIONS, LP., a foreign third party administrator. The home office is ATLANTA, GEORGIA.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200706469
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 19, 2007

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Texas Department of Insurance, Division of Workers' Compensation

Correction of Error

The Texas Department of Insurance, Division of Workers' Compensation proposed amendments to 28 TAC §§133.305, 133.307, and 133.308 in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9257). A typographical error appears in the preamble on page 9259, right column, thirteen lines from the bottom. The phrase "(t)(1)(B)(iv) and (v)(III)" should be "(t)(1)(B)(iv)(III)". The corrected sentence reads as follows:

"Proposed subsection (t)(1)(B)(iv)(III) specifies that the IRO shall send a response to the request for a letter of clarification to the Department and to all parties that received a copy of the IRO's decision within 5 days of receipt of the party's request for a letter of clarification, and that the IRO's response is limited to clarifying statements in its original decision; the IRO shall not reconsider its decision and shall not issue a new decision in response to a request for a letter of clarification."

TRD-200706464

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Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on Barbara Palermo's application for a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel at a location on Pulliam Creek approximately 7 miles upstream from the confluence of Pulliam Creek and the Nueces River in Edwards County.

The hearing will be held at 1:30 p.m. on Tuesday, January 22, 2008 at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744.

The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Beth Hilliard, TPWD, by mail: 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4482; or e-mail, beth.hilliard@tpwd.state.tx.us.

TRD-200706477
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 19, 2007

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Notice of Proposed Real Estate Transaction and Opportunity for Comment

Land Exchange--Presidio County

On January 24, 2008, the Texas Parks and Wildlife Commission (the Commission) will consider the transfer of approximately 1,850 acres at Big Bend Ranch State Park (BBRSP) to Len G. McCormick in exchange for approximately 2,667 acres, resulting in the elimination of seven individual inholding tracts from within the BBRSP boundary and a net increase of park acreage for Texas Parks and Wildlife Department (TPWD). TPWD will pay appraised fair market value for the additional acreage. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, by e-mail to ted.hollingsworth@tpwd.state.tx.us, or made in person at the time of the meeting.

TRD-200706354
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 13, 2007

♦ ♦ ♦

Notice of Proposed Real Estate Transaction and Opportunity for Comment

Land Sale--Palo Pinto County

On January 24, 2008, the Texas Parks and Wildlife Commission (the Commission) will consider sale of two tracts totaling approximately 0.443 acres to an adjacent landowner, O'Neal Distributing Company, for $7,500. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, by e-mail to ted.hollingsworth@tpwd.state.tx.us, or made in person at the time of the meeting.

TRD-200706355
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 13, 2007

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Notice of Proposed Real Estate Transaction and Opportunity for Comment

Acceptance of Conservation Easement--Bastrop County

On January 24, 2008, the Texas Parks and Wildlife Commission (the Commission) will consider accepting a conservation easement on approximately 200 acres adjacent to Bastrop State Park. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, by e-mail to corky.kuhlmann@tpwd.state.tx.us, or made in person at the time of the meeting.

TRD-200706356

Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 13, 2007

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 12, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Etan Industries, Incorporated, doing business as CMA Communications, for a State-Issued Certificate of Franchise Authority, Project Number 35109 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City Limits of North Cleveland, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35109.

TRD-200706406
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2007

♦ ♦ ♦

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 13, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Universal Cable Holdings, Incorporated, doing business as Suddenlink Communications, for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35114 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City Limits of Childress, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35114.

TRD-200706407
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2007

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 14, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35117 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the municipality of Hollywood Park, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35117.

TRD-200706475
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 19, 2007

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Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208

Notice is given to the public of AT&T Texas's application filed with the Public Utility Commission of Texas (commission) on November 28, 2007, to withdraw services pursuant to P.U.C. Substantive Rule §26.208.

Docket Title and Number: Application of Southwestern Bell Telephone, doing business as AT&T Texas, to Withdraw IntraLATA Prepaid Calling Card Pursuant to Subst. R. §26.208(h).

The Application: On November 28, 2007, Southwestern Bell Telephone d/b/a AT&T Texas (AT&T Texas) filed an application to withdraw Southwestern Bell IntraLATA Prepaid Calling Card. The product has become obsolete due to the availability of other prepaid calling services. This proceeding was docketed and suspended on November 30, 2007, to allow adequate time for review and intervention.

Persons wishing to comment on this application or intervene should contact the Public Utility Commission of Texas, by January 28, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-2989. All correspondence should refer to Docket Number 35075.

TRD-200706408
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2007

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Texas Residential Construction Commission

Guidelines for Administrative Penalties Related to First Violations of Filing, Payment, and Response Requirements

A. These guidelines will be used by staff to determine the amount of administrative penalty to recommend to the commission for a person's first violation of a filing, payment, or response requirement under the Texas Residential Construction Commission Act, title 16, Texas Property Code (the Act) or the rules of the Texas Residential Construction Commission, title 10, Texas Administrative Code (the commission rules). These guidelines serve only as a guide and the Executive Director may authorize staff to increase or decrease a penalty recommendation as circumstances may require in an individual case in order to further the objectives and policies of the Act and commission rules.

B. The filing requirements covered by these guidelines are the following:

(1) application to renew builder registration under chapter 416 of the Act and chapter 303, subchapter A, of the commission's rules;

(2) home registration under §426.003 of the Act and chapter 303, subchapter B, of the commission's rules;

(3) post-SIRP correspondence under §313.27 of the commission's rules;

(4) change of designated address under §303.13 of the commission's rules;

(5) change of registered name under §303.15 of the commission's rules;

(6) change in the form of business organization of the builder under §303.15 of the commission's rules;

(7) material change in information under §303.17 of the commission's rules; and

(8) inspection reports under §§313.13, 313.16, and 313.17 of the commission's rules

C. The payment requirements covered by these guidelines are the following:

(1) builder registration fee or registration renewal fee under §416.004 of the Act;

(2) late builder registration fee or late builder renewal fee under §303.1 of the commission's rules;

(3) home registration fee under §426.003 of the Act and §303.150 of the commission's rules;

(4) late home registration penalty under §426.003 of the Act and §303.150 of the commission's rules;

(5) SIRP inspection fee or reimbursement of SIRP inspection fee under §§426.004, 428.001, and 428.004 of the Act and §313.8 and §313.18 of the commission's rules;

(6) reporting fee for change of designated address under §416.010 of the Act and §303.13 of the commission's rules;

(7) reporting fee for change of registered name under §303.15 of the commission's rules;

(8) reporting fee for change in the form of business organization of the builder under §303.15 of the commission's rules;

(9) reporting fee for material change in information under §303.17 of the commission's rules;

(10) failure to honor a check or other instrument of payment issued to the commission, as described in §418.001(6) of the Act; and

(11) processing fee for a returned check or payment as described in §418.001(6) of the Act.

D. The response requirements covered by these guidelines are the following:

(1) response to a commission request for information regarding an incomplete application under §303.1 of the commission's rules; and

(2) response to a commission request for information regarding a complaint under §306.1 of the commission's rules.

E. No previous violation. These guidelines apply to a violation listed in these guidelines only if the person has committed no previous violation or previously has not entered into an agreed order to resolve an issue for purposes of avoiding an administrative hearing on an alleged violation of the Act or commission rules.

F. Corrective action. These guidelines apply only if the person voluntarily takes corrective action to resolve the violation by contacting the commission in response to receipt of the commission's notice(s) of violation issued to the registrant for an alleged violation and initiating a corrective action.

G. Amount of penalty.

(1) No penalty shall be assessed for a violation subject to these guidelines if no corrective action is required by the commission or if the person takes the corrective action that is specified in the notice of violation within 30 days after the date of delivery the notice of violation to the person at the person's official address of record or, if no official address of record exists, to the last address known by the commission for the person;

(2) If the matter is not resolved under subsection (1) of this section, the amount of the penalty for a violation that is subject to these guidelines shall be:

(a) $1,000 for each violation if the corrective action as specified in the notice of violation is taken between 31 and 60 calendar days after the notice of violation is delivered to the person at the person's official address of record on file with the commission or, if no official address of record exists, to the last address known to the commission for the person;

(b) $5,000 for each violation if the corrective action as specified in the notice of violation is taken between 76 and 150 days after the notice of violation is delivered to the person at the person's official address of record on file with the commission or, if no official address of record exists, to the last address known to the commission for the person; or

(c) a different amount agreed upon by the commission and the person.

H. Registration to remain in good standing. If these guidelines apply and the registrant takes the corrective action as specified in the commission's notice(s) of violation issued to the registrant, then the builder registration and the designated agent registration of the registrant shall remain in good standing and not be subject to revocation, suspension, or reprimand by the commission as a result of the violation.

I. Multiple violations. These guidelines shall not apply if the person has committed two or more violations, whether of the same, similar, or different types.

TRD-200706411
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: December 18, 2007

♦ ♦ ♦

Stephen F. Austin State University

Notice of Consultant Contract Amendment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of consultant contract amendment. The original Master Software License, Services and Maintenance Agreement is between The Inc. State of Texas, acting by and through the Department of Information Resources, and SunGard SCT, Inc., as amended between SunGard SCT, and the State of Texas, administered by Texas A&M University - Corpus Christi, for and on behalf of the Texas Connection Consortium. The original contract was executed in 2002 and amended by a Work Order for services to Stephen F. Austin State University, a member institution, on September 10, 2004. Stephen F. Austin State University is initiating a purchase order to begin utilizing training and/or consulting services under this Master Agreement. The total sum of the services for the University is estimated to be $1,567,279 for the period through August 31, 2011.

Vendor contact for the contract is Walt Glass, Account Manager, SunGard Higher Education, 3211 Internet Blvd., Ste. 230, Frisco, TX 75034, Tel (469) 675-0129, Fax (610) 578-3129.

Documents, films, recording, or reports of intangible results will not be presented by the outside consultant.

For further information, please contact Paul Davis, Director of Information Technology Services, PO Box 13012, Nacogdoches, TX 75962, (936) 468-1110.

TRD-200706446
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: December 18, 2007

♦ ♦ ♦

Supreme Court of Texas

Final Adoption of Statewide Rules Concerning the Electronic Filing and Service of Documents in Participating Justice of the Peace Courts

Misc. Docket No. 07-9200

ORDERED that:

1. As required by the Act of May 3, 2007, 80th Leg., R.S. ch. 63, 2007 Tex. Sess. Law Serv. 58 ("SB 237"), and in accordance with its mandatory deadline, the Court adopts the following Statewide Rules Concerning the Electronic Filing and Service of Documents in Participating Justice of the Peace Courts.

2. Pursuant to Misc. Docket No. 07-9166, these rules were published in the October 2007 Texas Bar Journal with public comments invited through November 30, 2007. The order provided that "[t]hese rules, with any modifications made after public comments are received, take effect January 1, 2008." Misc. Docket No. 07-9166 (September 20, 2007).

3. The final version of the rules shown on the following pages reflects modifications to Rule 2.2 made after public comment. The remaining rules are adopted as previously published. The rules take effect January 1, 2008.

4. The Clerk is directed to:

a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the Texas Bar Journal;

c. send a copy of this Order to each elected member of the Legislature; and

d. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us.

SIGNED this 10th day of December, 2007.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Harriet O'Neill, Justice

_____

J. Dale Wainwright, Justice

_____

Scott Brister, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

STATEWIDE RULES CONCERNING THE ELECTRONIC FILING AND SERVICE OF DOCUMENTS IN PARTICIPATING JUSTICE OF THE PEACE COURTS

PART 1. GENERAL PROVISIONS

Rule 1.1 Scope

These rules govern the electronic filing and service of documents in civil cases in all participating justice of the peace courts. These rules are adopted pursuant to Texas Government Code §22.004(f), and may be known as the Statewide Rules Concerning the Electronic Filing and Service of Documents in Participating Justice of the Peace Courts.

Rule 1.2 Electronic Filing Optional

In a participating justice of the peace court, a party may electronically file any documents that are permitted to be electronically filed under Rule 3.1.

Rule 1.3. Participation in Electronic Filing By Justice of the Peace Courts

(a) Each justice of the peace in Texas may determine whether the court over which the justice of the peace presides will accept electronically filed documents. These rules do not require any individual justice of the peace to accept electronically filed documents. Documents may be electronically filed only in a participating justice of the peace court.

(b) The county clerk of each county must maintain a current list, available to the public at no charge in the county clerk's office--and, if the county has a website accessible by the public at no cost, on the

county's website as well--of participating justice of the peace courts in the county. After a justice of the peace court has begun participating in electronic filing, it must continue to do so until the justice of the peace has notified the county clerk, the county commissioner's court, and TexasOnline that the court will no longer participate and that the TexasOnline account has been closed, at which time the county clerk must promptly update the list to reflect the change. A justice of the peace court must provide advance notice of its decision to cease participating in electronic filing, in the form of (1) a general notice posted in a prominent place in the clerk's office or other location where the paper filings for the justice of the peace court are made, the county clerk's office, and the county's website, if available, posted in each location for at least 30 consecutive days before the TexasOnline account is closed; and (2) direct notice by e-mail or other means, provided at least 7 days before the TexasOnline account is closed, to every party registered with TexasOnline in a case then pending in the justice of the peace court.

PART 2. DEFINITIONS

Rule 2.1 Specific Terms

The following definitions apply to these rules:

(a) "Civil cases" means all cases filed in small claims court and all non-criminal cases filed in the justice courts. The term does not include matters handled by a justice of the peace acting as a magistrate.

(b) "Convenience fee" is a fee charged in connection with electronic filing that is in addition to regular filing fees. A convenience fee charged by the justice of the peace court will be considered as a court cost.

(c) "Digital signature" means a confidential and unique electronic identifier issued to a filer upon registration with TexasOnline. See Rule 4.2.

(d) "Digitized signature" means a graphic image of a handwritten signature.

(e) "Document" means a pleading, plea, motion, application, request, exhibit, brief, memorandum of law, paper, or other instrument in paper form or electronic form. The term does not include court orders.

(f) "Electronic filing" is a process by which a filer files a court document with the justice of the peace court by means of an online computer transmission of the document in electronic form. For purposes of these rules, the process does not include the filing of faxed documents described as the "electronic filing of documents" in Tex. Gov't Code §51.801.

(g) "Electronic filing service provider" (EFSP) means a business entity that provides electronic filing services and support to its customers (filers). An attorney or law firm may act as an EFSP.

(h) "Electronic order" means a computerized, non-paper court order that a justice of the peace signs by applying his or her digitized signature to the order.

(i) "Electronic service" is a method of serving a document upon a party in a case by electronically transmitting the document to that party's e-mail address.

(j) "Electronically file" means to file a document by means of electronic filing.

(k) "Electronically serve" means to serve a document by means of electronic service.

(l) "Filer" means a person who files a document, including an attorney.

(m) "Justice of the peace court" means a justice court or a small claims court, as defined by chapters 27 and 28 of the Texas Government Code and Texas Constitution Article V, §19.

(n) "Paper court order" means a court order that is generated and signed on paper.

(o) "Paper filing" and "filing in paper format" describe a process by which a filer files a paper document with a justice of the peace court.

(p) "Participating justice of the peace court" means a justice of the peace court that has set up a TexasOnline account to accept electronically filed documents and has notified the county clerk and the county commissioner's court of the court's participating status.

(q) "Party" means a person or entity appearing in any case or proceeding.

(r) "Registered e-mail address" means an e-mail address a filer has registered with TexasOnline for the transmission or receipt of electronically filed documents.

(s) "Regular filing fees" are those filing fees charged in connection with paper filing.

(t) "Rules" are the Statewide Rules Concerning the Electronic Filing and Service of Documents in Participating Justice of the Peace Courts.

Rule 2.2 Self Representation

The term "attorney" shall apply to a self-represented party, such as a person representing himself or herself in a justice of the peace court, or a corporate representative who is not a licensed attorney appearing on behalf of a corporation either in small claims court as authorized by Texas Government Code §28.003(e) or in justice court as authorized by Texas Government Code §27.031(c).

PART 3. APPLICABILITY

Rule 3.1 Documents That May Be Electronically Filed

(a) A document that can be filed in paper format may be electronically filed with a participating justice of the peace court, with the exception of the following documents:

i) citations or writs bearing the seal of the court;

ii) returns of citation;

iii) bonds;

iv) subpoenas;

v) proof of service of subpoenas;

vi) documents to be presented to a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents; and,

vii) documents sealed pursuant to Texas Rule of Civil Procedure 76a.

(b) A motion to have a document sealed, as well as any response to such a motion, may be electronically filed.

Rule 3.2. Documents Containing Signatures

(a) A document that is required to be verified, notarized, acknowledged, sworn to, or made under oath may be electronically filed only as a scanned image.

(b) A document that requires the signatures of opposing parties (such as an agreement between attorneys or parties pertaining to a pending suit) may be electronically filed only as a scanned image.

(c) Any affidavit or other paper described in Rule 3.2(a) or (b) that is to be attached to an electronically filed document may be scanned and electronically filed along with the underlying document.

(d) Where a filer has electronically filed a scanned image under this rule, a court may require the filer to file the document in paper format.

(e) When a document is filed as a scanned image under Rule 3.2(a) or (b), the filer must retain the original document from which the scanned image has been made. Upon a party's request, a court shall require a party that electronically filed a scanned image of a document under Rule 3.2(a) or (b) to allow another party to inspect the original document.

PART 4. FILING

Rule 4.1 TexasOnline

(a) Texas Online is a project of the Texas Department of Information Resources (DIR), a state agency charged with establishing a common electronic infrastructure through which state agencies and local governments may electronically send and receive documents and required payments.

(b) To become registered to electronically file documents, filers must follow registration procedures outlined by TexasOnline. The procedure can be accessed from TexasOnline's website at www.texasonline.com.

(c) Filers do not electronically file documents directly with the justice of the peace court. Rather, filers indirectly file with the justice of the peace court by electronically transmitting the document to an electronic filing service provider (EFSP), which electronically transmits the document to TexasOnline, which then electronically transmits the document to the justice of the peace court. A filer filing a document must have a valid account with a TexasOnline EFSP.

(d) Consistent with standards promulgated by the Judicial Committee on Information Technology (JCIT), TexasOnline will specify the permissible formats for documents that will be electronically filed and electronically served.

(e) Filers who electronically file documents will pay regular filing fees to the justice of the peace court indirectly through TexasOnline by a method set forth by TexasOnline.

(f) An EFSP may charge filers a convenience fee to electronically file documents. This fee will be in addition to regular filing fees.

(g) TexasOnline will charge filers a convenience fee to electronically file documents. This fee will be in addition to regular filing fees and will be in an amount not to exceed the amount approved by the DIR Board.

(h) The justice of the peace court may charge filers a convenience fee to electronically file documents, in an amount not to exceed the amount approved by the DIR Board. This fee will be in addition to regular filing fees, credit card fees, or other fees.

Rule 4.2 Signatures

(a) Upon completion of the initial registration procedures, each filer will be issued a confidential and unique electronic identifier. Each filer must use his or her identifier in order to electronically file documents. Use of the identifier to electronically file documents constitutes a digital signature on the particular document.

(b) The attachment of a digital signature on an electronically filed document is deemed to constitute a signature on the document for purposes of signature requirements imposed by the Texas Rules of Civil Procedure or any other law. The person whose name appears first in the signature block of an initial pleading is deemed to be the attorney in charge for the purposes of Texas Rule of Civil Procedure 8, unless otherwise designated. The digital signature on any document electronically filed is deemed to be the signature of the attorney whose name appears first in the signature block of the document for the purpose of Texas Rules of Civil Procedure 13 and 57.

(c) A digital signature on an electronically filed document is deemed to constitute a signature by the filer for the purpose of authorizing the payment of document filing fees.

Rule 4.3 Time Document is Filed

(a) A filer may electronically transmit a document through an EFSP to TexasOnline 24 hours per day each and every day of the year, except during brief periods of state-approved scheduled maintenance which will usually occur in the early hours of Sunday morning.

(b) Upon the electronic transmission of a document to a filer's EFSP, the filer is deemed to have delivered the document to the justice of the peace court and, subject to Rule 4.3(h), the document is deemed to be filed. If a document is electronically transmitted to the filer's EFSP on or before the last day for filing the same, the document shall be filed by the court and deemed filed in time. A transmission report by the filer to the filer's EFSP shall be prima facie evidence of date and time of transmission.

(c) On receipt of a filer's document, the filer's EFSP must send the document to TexasOnline in the required electronic file format along with an indication of the time the filer sent the document to the EFSP and the filer's payment information. TexasOnline will electronically transmit to the filer an acknowledgment that the document has been received by TexasOnline. The acknowledgment will note the date and time that the electronically-transmitted document was received by TexasOnline.

(d) Upon receiving a document from a filer's EFSP, TexasOnline shall electronically transmit the document to the justice of the peace court. If the document was not properly formatted, Texas Online will transmit a warning to the filer's EFSP.

(e) The justice of the peace court shall accept the document for filing provided that the document is not misdirected and complies with all filing requirements. The justice of the peace court must accept electronically-transmitted documents that are filed in connection with an affidavit of inability to afford court costs in the manner required by Texas Rule of Civil Procedure 145. If the justice of the peace court fails to accept or reject a document within one business day, the document is deemed to have been filed.

(f) If the document is accepted for filing, the justice of the peace court shall note the date and time of filing which, with the exception of subsection (h) below, shall be the date and time that the filer transmitted the document to the filer's EFSP. The justice of the peace court shall inform TexasOnline of its action the same day action is taken. TexasOnline shall, on that same day, electronically transmit to the filer's EFSP a confirmation that the document has been accepted for filing by the justice of the peace court. The EFSP will electronically transmit the confirmation to the filer. This confirmation will include an electronically file-marked copy of the front page of the document showing the date and time the justice of the peace court considers the document to have been filed.

(g) If the document is not accepted for filing, the justice of the peace court shall inform TexasOnline of its action, and the reason for such action, the same day action is taken. TexasOnline shall, on that same day, electronically transmit to the filer's EFSP an "alert" that the document was not accepted along with the reason the document was not accepted. The EFSP will electronically transmit the alert to the filer.

(h) Except in cases of attachment, garnishment, sequestration, or distress proceedings, documents that serve to commence a civil suit will not be deemed to have been filed on Sunday when the document is electronically transmitted to the filer's EFSP, TexasOnline, or the justice of the peace court on Sunday. Such documents will be deemed to have been filed on the succeeding Monday.

Rule 4.4 Multiple Documents

(a) Except as provided by subsection (b) below, a filer may include only one document in an electronic transmission to TexasOnline.

(b) A filer may electronically transmit a document to TexasOnline that includes another document as an attachment (e.g., a motion to which is attached a brief in support of the motion).

Rule 4.5 Official Document

(a) The justice of the peace court's file for a particular case may contain a combination of electronically filed documents and paper documents.

(b) The justice of the peace court may maintain and make available electronically filed documents in any manner allowed by law.

Rule 4.6 Registered E-mail Address Required

A filer must include the filer's registered e-mail address on any electronically filed document, along with the filer's mailing address; telephone number; telecopier (fax) number, if available; and, if the filer is an attorney licensed in Texas, the filer's State Bar of Texas identification number.

Rule 4.7 Document Format

Electronically-filed documents must be computer-formatted as specified by TexasOnline. Electronically-filed documents must also be formatted for printing on 8 1/2-inch by 11-inch paper.

PART 5. SERVICE OF DOCUMENTS OTHER THAN CITATION

Rule 5.1 Electronic Service of Documents Permissible

(a) Texas Rule of Civil Procedure 21a provides that, except for the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in the Rules of Civil Procedure, documents filed with a court or otherwise required to be served upon a party may be served by delivering a copy to the party, or to the party's authorized agent or attorney, in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer (fax) to the recipient's current telecopier (fax machine) number, or by such other method as the court in its discretion may direct. In addition to those methods, a filer may serve documents upon another party in the case by electronically transmitting the document to that party, either through TexasOnline to the party's registered e-mail address or directly to the party at the e-mail address provided by the party upon agreeing to receive electronic service, as updated by the party as provided in paragraph (c) below. Service in either manner is known as "electronic service" and is permissible in the circumstances set out in paragraph (b) below.

(b) Documents may be electronically served upon a party only where that party has agreed to receive electronic service.

(c) By virtue of electronically filing or serving a document or by agreeing to receive electronic service, a party additionally agrees to provide information regarding any change in his or her e-mail address to TexasOnline, the justice of the peace court, and all parties in the case within 24 hours of the change.

(d) A party who electronically files a document is not required to electronically serve documents upon other parties.

(e) A filer may electronically serve a document in instances where the document is filed in paper format as well as in instances where the document is electronically filed.

Rule 5.2 Completion of Service and Date of Service

(a) Service shall be complete upon the sender's initiation of an electronic transmission of the document under either of the methods of electronic service specified in Rule 5.1(a). However, nothing in this rule precludes a party from offering proof that the electronic transmission was not timely received for reasons beyond the control of the intended recipient, and upon so finding, the court may extend the time for taking the action required of the intended recipient or grant such other relief as it deems just.

(b) Except as provided by subsection (c) below, the date of service shall be the date the electronic service is complete.

(c) When electronic service is complete after 5:00 p.m. (recipient's time), then the date of service shall be deemed to be the next day that is not a Saturday, Sunday, or legal holiday.

Rule 5.3 Certification of Service

(a) Documents to be electronically served upon another party shall be served before the time or at the same time that the document is filed.

(b) A document served electronically must contain a certificate of electronic service that must include, in addition to any other requirements imposed by the Texas Rules of Civil Procedure, the following:

(i) the filer's e-mail address and, if available, the filer's telecopier (fax machine) number;

(ii) the recipient's e-mail address;

(iii) the date and time of electronic service; and

(iv) a statement either that the document has been electronically served, or that the document is being electronically served concurrent with the electronic filing of the document.

PART 6. ELECTRONIC ORDERS AND VIEWING OF ELECTRONICALLY-FILED DOCUMENTS

Rule 6.1 Courts Authorized to Make Electronic Orders

(a) A justice of the peace may electronically sign an order by applying his or her digitized signature to the order. Justices of the peace are not required to electronically sign orders.

(b) Upon electronically signing an order, the justice of the peace may maintain the electronic order as an official copy of the order or print the electronic order and treat the printed order as an official copy of the order.

(c) The justice of the peace court may electronically scan a paper court order. The scanned court order may then serve as the official copy of the court order. The court is not required to electronically scan paper court orders in order to create official electronic court orders. Electronic scanning of paper court orders is at the option of the court.

Rule 6.2 Viewing of Electronically-filed Documents

(a) The justice of the peace court shall ensure that all the records of the court, except those made confidential or privileged by law, rule, or court order, may be viewed in some format by all persons at no charge. Nothing in this rule allows for the viewing of documents or court orders, in any form, that are confidential or privileged by law, rule, or court order.

(b) Independent of the TexasOnline system and the requirement of viewing access described in subsection (a), a justice of the peace court may choose to provide for both filers and the general public to electronically view documents or court orders that have been electronically filed or scanned. Where such provision has been made, persons may electronically view documents or court orders that have been electronically filed or scanned.

PART 7. MISCELLANEOUS PROVISIONS

Rule 7.1 Assigned Court to Resolve Disputes

In the event a dispute should arise involving the application of these rules or various electronic filing issues, the justice of the peace court assigned to the case in which the dispute arises shall decide any dispute.

Rule 7.2. Rule Guiding Interpretation

These rules shall be liberally construed so as to avoid undue prejudice to any person on account of using the electronic filing system or sending or receiving electronic service in good faith.

TRD-200706412
Jody Hughes
Rules Attorney
Supreme Court of Texas
Filed: December 18, 2007

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).